United States Court of Appeals for the Second Circuit



APPENDIX

75-7600

United States Court of Appeals

For the Second Circuit

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

JOINT APPENDIX

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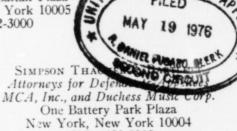
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ALLEN ARROW

resumed.

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BY MR. BAKER:

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Mr. Arrow, during your discussions with Mr. Chiantia, did he at any time express to you any view as to whether it would be in the best interests of the music publishing irdustry to license performing rights either directly or through ASCAP?

A I think --

THE COURT: As alternatives?

MR. BAKER: As alternatives?

THE COURT: Which was better?

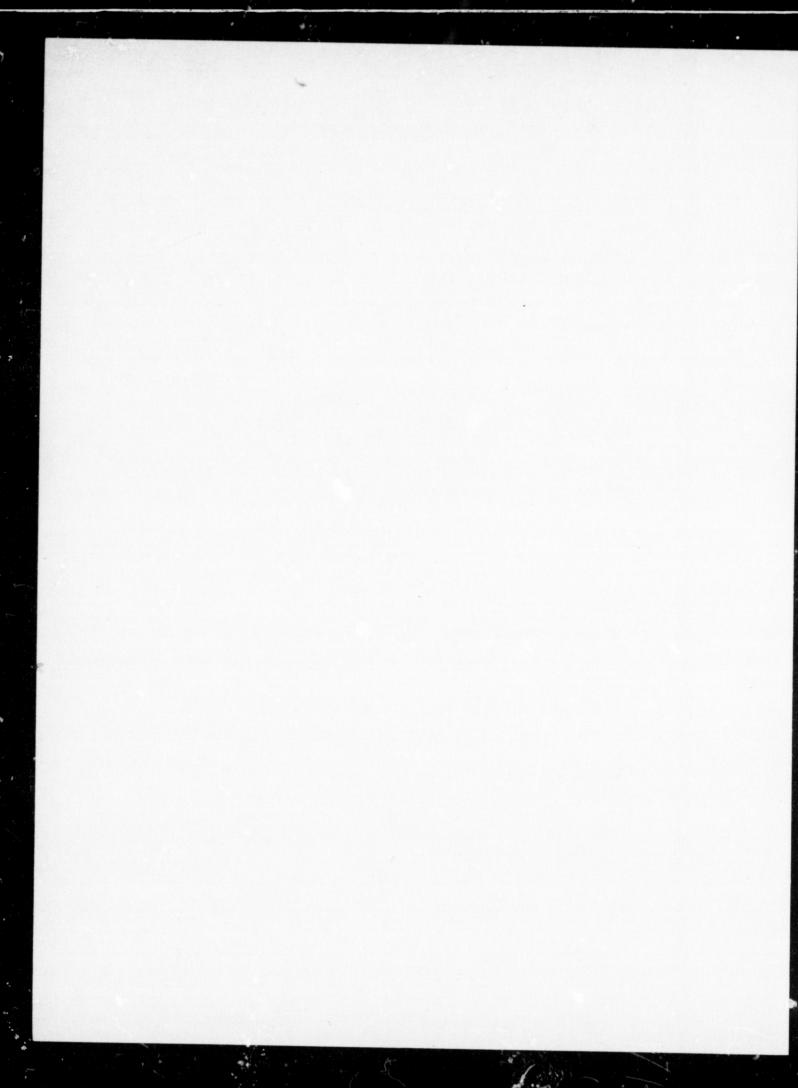
MR. BAKER: Yes.

I think Mr. Chiantia said to me on more than one occasion that it was better to license performance rights through associates than by means of individual licenses.

Q Do you recall whether this view was one of the reasons that he wished to verify the status of the 31-ASCAP negotiations?

MR. TOPKIS: I take it that means was it one of the reasons that he expressed.

> THE COURT: Yes, I take it, too. THE WITNESS: I am not sure.



15.

Q ASCAP representatives or ASCAP members.

Q I would like to show you your testimony given on deposition in this action, Page 287, beginning at Line 15 and running through the first line on Page 288.

Does that refresh your recollection in any way?

A Well, it indicates that that is what I stated during the deposition. It would be consistent with my feeling of what Mr. Chiantia's views were, but I don't specifically recall now that it was stated during any specific meeting.

Q In the course of your discussions with Mr.
Chiantia, either before or after the execution of the
agreement between 3M and Leeds, did you discuss the subject
of unfavorable reaction to 3M°s direct licensing by ASCAP
or any ASCAP publisher members?

MR. TOPKIS: Could I hear the question, please?

(Question read.)

MR. TOPKIS: Again, a yes or no answer I wouldn't object to, but I would object to anything more than that.

THE COURT: It only calls for a yes or no answer at this stage.

A I am not sure I understand the question. You mean unfavorable reaction, from whom?

A Yes, we did.

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about that discussion for the purpose of determining the state of mind of the person who made that discussion, who made the statements, namely, Mr. Chiantia, and only for the purpose of showing that the statements were made and not for the truth of the statements.

THE COURT: I will accept it for that purpose.

Q And do you recall what Mr. Chiantia said to you in this ___ad?

MR. TOPKIS: Could we fix the time of this, approximately, because at one time Mr. Chiantia was not a member of the ASCAP board and at a subsequent time he was.

THE COURT: Would you tell us, as well as you can recall, when this occurred?

THE WITNESS: During the initial stages of our discussion or discussions with Mr. Chiantia.

THE COURT: Which would be late October or November, 1964?

THE WITNESS: Yes. We had some dialogue about the reaction of ASCAP publishers to Leeds issuing this type of license.

I was told by Mr. Chiantia that he had had communications with other publishers, some of whom

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eventually licensed 3M, and we were led to believe by Mr. Chiantia that Leeds was ready to enter into an agreement.

Subsequent to this kind of discussion and while we were still trying to attract enough publisher interest to make the program a reasonable possibility, Mr. Chiantia delivered to us an executed copy of this agreement and thereafter — I believe it was the next day — called me and asked me to meet with him and Mr. Adams with respect to an incident which I was told had occurred at ASCAP.

THE COURT: With Mr. Stanley Adams?

THE WITNESS: No. Mr. Berle Adams.

THE COURT: Who was he?

THE WITNESS: He was an officer of MCA, a company which I believe had purchased Leeds and Duchess during the time intervening.

- Q Do you recall when that meeting occurred?
- A No, I don't recall.
- Q Could you check your diary for January 26, 1965?
- A Yes, I see thaton January 26, 1965, there was a meeting scheduled with Sal Chiantia and Berle Adams.

THE COURT: Not just scheduled, but held?

THE WITNESS: I think it was held, sir. I know a meeting was held and I would assume it was that day.

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Can you tell us the substance of the conversation at that meeting? 3

A Mr. Chiantia told me that his immediate supervisor, Mr. Levy, had had a discussion at ASCAP with respect to the 3M license and that Mr. Levy had instructed Mr. Chiantia to renounce the license or to withdraw and Mr. Chiantia thought that the matter was of sufficient importance to involve Mr. Adams, who was apparently the man who had been put in charge of both Mr. levy and Mr.

Chiantia by the acquiring company.

I was asked to explain the situation to Mr. Adams and I did and I think I told Mr. Chiantia at that time that as far as 311 was concerned and certainly as far as I was concerned on a personal basis if the existence of the contract was in any way embarrassing or if Mr. Chiantia thought he had overstepped his authority in dealing with 3M, we were ready to hand him back the signed piece of paper.

Mr. Adams, I think at one time during the meeting, said that he didn't in any way want to interfere with Mr. Chiantia's judgment and eventually the contract was fully executed and 3M stillhas a license from leeds.

THE COURT: I am a little confused. I thought it was fully executed the day before the meeting.

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THE HIMMES. I don't think it had been executed by 3M, sir.

THE COURT: But they stick by it?

THE WITNESS: Yes, sir.

Q Do you recall the focus of Mr. Adams' concern? MR. TOPKIS: I object, your Honor.

THE COURT: Mr. Adams' concern?

MR. BAKER: Yes.

Why was he there? What sorts of questions did he ask? What subjects was he interested in?

THE COURT: How would that apply? You said that the purpose of this was to indicate what Mr. Chiantia's state of mind was.

Are you broadening that now to Mr. Adams' state: of mind?

MR. BAKER: Yes, sir.

THE COURT: All right.

A Mr. Adams was interested in the history of the negotiations with ASCAP and he was interested in learning what Leeds' liability could be in the 'event that it was doing something which it had no right to do.

I felt at the time, although I can't recall any specific comment, that he was really making a judgment between the authority of Mr. Levy and the authority of

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Mc. Chiantia.

And of course eventually he apparently voted in favor of the Chantia position.

THE COUNT: All we know is that the contract was not canceled, is that might?

THE WITHESS: That's correct.

Q I would now hike to hand to the witness 3M Exhibit
PX53 and ask it he can identify it.

Have you seen this letter before, Mr. Arrow?

- A Yes.
- Q Do you know who the author of the letter is?
- A Mr. Lindgren.
- Q Do you know whether the letter was ever sent to Mr. Chiantie?

A I don't know that it was delivered but I presume it was sent.

MR. BARR: E will offer it in evidence.

MR. TOPRIES: I object to it. This is a letter from Mr. Lindgmen to Mr. Chiantia in 1967. April 17, 1967, apparently, and seems to have to do with some complaints about how 3M was picking its music and who was going to pay for a dozen shirts.

I don't think either subject is terribly relevant to this proceeding.

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THE COURT: Putting that as de, I don't see how we can put it in evidence on Mr. Arrow's statement that he presumes it was sent.

MR. BAKER: Well, I --

about the subject matter, I don't see why you can't just ask him questions relating to the subject matter.

If he doesn't recall them, and you think it might refresh his recollection, you can show him that or any other document to refresh his recollection.

Q Directing your attention --

THE COURT: Just ask questions.

MR. HRUSKA: We have a stipulation, I think, that is pertinent to the document.

The stipulation is that documents marked for identification during the course of depositions, as this one was, shall be deemed to have been sent and received as indicated unless notice is given by one of the parties prior to its use.

I know that ASCAP did not give such notice and I don't know if BMI did.

If that is the case, we can offer it with respect to ASCAP.

MR. TOPKIS: There is no addressee on the

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letter, your Honor.

There is no signature, which is more important.

MR. HRUSKA: Well, we have that established.

Mr. Arrow has said that Mr. Lindgren wrote the letter and I think we all know that Sal is Sal Chiantia. any event, we can establish that.

THE COURT: I suppose it could be San Mineo.

MISS KEARSE: I wonder if he knows of his own knowledge that it was sent or whether it is based on a statement to that effect by Mr. Lindgren, which would not be admissible.

T HE COURT: Is it signed?

MR. HRUSKA: No. This is a copy that is marked as having been received by Ohrenstein, Arrow & Lourie on April 17, 1967, by virtue of the samp on the top of the letter.

It was sent to Mr. Arrow and I believe Mr. Arrow testified --

THE COURT: Did you receive a copy of this letter from Mr. Lindgren?

THE WITNESS: Yes.

THE COURT: I think that is sufficient to establish, unless you have something to the contrary, that Mr. Lindgren did indeed send it.

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It is a reasonable conclusion to draw.

Now, we get to the question of the subject

matter and I suppose I will have to look at the letter.

MR. TOPKIS: Please do.

MR. HPUSKA: Read the next to last paragraph,

your Honor.

THE COURT: That is the paragraph we are concerned

with?

MR. HRUSKA: That is a key paragraph.

THE COURT: Is Mr. Lindgren alive and well?

MR. HEUSKA: He is in Minneapolis

and we did talk to him and to didn't want to come here and that is the status of it.

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THE COURT: Will you make as offer of proof with regard to this paragraph?

What is it you are trying to bring out as the result of this paragraph?

MR. BAKER: I am simply trying to-- I can give you both the question and the answer I expect to bring out, your Honor.

The question is simply: Will you tell me if you know what was the basis for the moral obligation of 3M to Mr. Chiantia which is referred to in this letter.

THE COURT: I was looking at something other than that because I was told the next-to-last paragraph was it.

MR. HRUSKA: I may have misstated it.

MR. BAKER: You are absolutely right.

THE COURT: What paragraph?

MR. BAKER: The next-to-the-last one.

THE COURT: Right. Excuse me, I locked at the wrong paragraph. You are right.

I didn't see the very last sentence.

Well, I will accept that paragraph ir evidence as something which Mr. Lindgren wrote for the purpose of asking this witness if he knows what that meant. He may

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Q Mr. Arrow, do you know of any moral obligation which 3M had loward Mr. Chiantia?

MR. TOPKIS: I object to that question, your Honor. It can call for almost anything.

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THE COURT: Let's see what comes of it. Then.

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I will judge it accordingly.

I am very confused as to just what this is going to produce.

A You mean with respect to background music program?

Q Yes, sir.

A 3M had felt that Mr. Chiantia had been very helpful in discussing the 3M direct licensing program with other publishers.

ers who else is entering into this program; and because of Mr. Chiantia's articulation and his representation in the field, we would generally refer these inquiries to him or to Mr. Brettler of Shapiro Bernstein. And we were hopeful that on the basis of the information which was given by either Mr. Chiantia or Mr. Brettler, and particularly with respect to publisher's right to issue these licenses, 3M would have been entitled to do ac, or would have been put in a position to enter into license agreements with other publishers.

In particular, we needed to have some essurance from third parties directed to the potential licensors that they were able legally to issue a non-exclusive license to

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Our firm could not be in a position of advising them and very few of the persons with whom we spoke were sufficiently suphisticated to understand what the consent decrees were all about; so we generally referred them to Sal Chiantia or to Leon Brettler or possibly someone else

as we continued our discussions.

I think Sal in particular took a lot of time in explaining the situation to other publishers, and I think that was the moral obligation that Lindgren was talking about here.

THE COURT: How do you know that? I take it you may be entirely correct but you are assuming it, isn't that right?

THE WITNESS: Yes, I am assuming it, sir, but we did discuss it.

THE COURT: In any event, he believes that 3M felt some obligation to Mr. Chiantia because of the assistance he gave to the proposed program.

Is that right?

THE WITNESS: Yes, sir, we certainly felt an obligation not to treat him any worse than any other publisher.

MR. BAKER: I would like to now hand the witness 3M PX 51 and ask him if he can identify that document.

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THE COURT: What kind of agreement is it?

THE WITNESS: 'les, sir.

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THE WITNESS: This is an agreement whereby 3M 2 has agreed to pay to Leeds Music Corporation and Pickwick Music Corporation together a fee of \$15,000 as a consultative fee, which fee is to be treated an advance against royalties which would accrue out of the agreement we have already seen.

THE COURT: All right.

Q What services were rendered by Leeds and/or Pickwick in exchange for the \$15,000?

A Mr. Chiantia had been extremely helpful in advising 3M, Mr. Lindgren in particular and me secondarily, with respect to the Identification of other publishers who might be interested in entering into this kind of agreement.

He had also been ready, willing, and apparently able to discuss the subject with publishers we referred to him.

He had also been extremely helpful in advising 3M with respect to its overseas operations, kparticularly in the nature of our proposed negotiations with PAS England and Gema of Germany.

And at the same time Mr. Lindgren and I had the opinion that Leeds in particular had not gotten the full measure that they deserved out of the original licensing program, and that is that when we went into it, we though:

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we would use a certain number of Leeds' compositions and

when we got down to it, we found we were using fewer; so

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in order to make up the gap and also in order to reward Mr.

Chiantia for theservices which he rendered to 3M, we agreed to give him this additional fee.

THE COURT: To give actually to his employer, is that right, to Leeds?

Q On the day of your first discussions with Leeds,

did you also have a meeting with respresentatives of Paramount
Pamous for the purpose of leasing performance rights to the

M700?

THE WITNESS: Yes, to his employer, right.

- A Well--
- Q Do you have the question in mind?

THE COURT: Are you asking the witness whether he has a question?

MR. BAKER: No, I asked him whether he had the question in mind, my previous question.

A On the day that we met with Leeds for the first time, which was October 29, we did have a meeting with Pamous-Paramount.

THE COURT: Are we finished with Leeds now? Are we going to another publisher?

MR. BAKER: We are going to another publisher, and

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there may be one or two occasions --

THE COURT: I am not forbidding you to come

I just wanted to know if you are switching to another subject.

All right.

- Do you recall how that meeting was arranged? THE COURT: This is October 27th or something like that.
 - October 29.
 - October 29, 1964.
- A It was probably arranged by my making a telephone call to one of the principals or one of the officers of Pamous-Paramount.
 - And do you recall where the meeting was held?
 - Yes, it was at Paramount's offices.
- Do you recall the substance of the discussions with-- I'm sorry -- who was there on behalf of Paramount?
- A Mr. Sid Herman, I believe Mr. Timberlake, and possibly one other representative of Paramount.

Mr. Lindgren was there, Mr. Herzog and J.

Can you relate to me the substance of those digcussions?

THE COURT: Well, to the extent that it was the

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Arrow-direct

same as the other discussions you have had with publishers, please don't.

You can just tell me that it was.

If there was anything distinctive about it, tell

A There was no substantive distinction. I think the meeting concluded with the expression on Paramount's part that they would think about the situation and contact us.

Q Did they indicate to you at that meeting whether they intended to have discussions with ASCAP concerning the status of the 3M-ASCAP negotiations?

A They probably did.

Q Do you recall when the next meeting occurred between representatives of Paramount and 3M?

A According to my diary, the next in-person meeting was November 13th and it was at Paramount.

Q Between the meeting on October 29th and November 13th, 1964, do you know whether there were any communications between representatives of 3M and representatives of Paramount?

A Well, I am sure I had some telephone discussions with Mr. Herman, and probably with Mr. Timberlake, and possibly with Mr. Arthur Israel.

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A Yes, I can.

Q And whose signature is it?

or in the course of in-person meetings.

A Mr. Lindgren's.

MR. BAKER: I would like to hard the witness

3M PX 144 and ask him if he can identify the signature on

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THE COURT: You say page 2, is that the end of the document?

MR. BAKER: Yes, sir.

- Have you ever seen this letter before?
- I don't recall seeing it.

MR. BAKER: I would at this time, your Honor, like to offer into evidence 3M PX 144 for !dentification; for the purpose of showing that it is an offer of certain terms made by Mr. Lindgren to Paramount.

MR. TOPKIS: Well, for non-hearsay use I have no objection to its receipt.

THE COURT: All right.

MISS KEARSE: Same, your Honor.

THE COURT: Received for that specific purpose.

(3M PX 144 received in evidence as indicated.)

- Mr. Arrow, I direct your attention to the first paragraph at the top of page 2 and ask you whether that refreshes your recollection as to the minimum of selections which 3M offered to Paramount.
 - A Yes.
- How many selections was 3M prepared to guarante: Q the usage of?
 - A 100.

I am not quite clear what it is THE COURT:

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that refreshes Mr. Arrow's recollection.

I remember him having said before that the various people they offered to guarantee between 100 and 200.

Am I supposed to draw some different conclusion because he says 100?

MR. BAKER: No, I am simply trying to establish on the record what the offer made to Paramount was and it is really prefatory to the next question, your Honor.

MR. TOPKIS: It is already on the record, I would think; through the receipt in evidence of this letter.

THE . URT: Yes, but I didn't know it.

MR. TOPKIS: I'm sorry, your Honor.

MR. HRUSKA: Would your Honor like to see copies of these documents as they are admitted?

THE COURT: As they are introduced if they are going to be referred to, yes. Otherwise, I don't want to have a big collection up here. And I don't like to keep the originals because then they get mixed up.

Are you going to question further on this document now?

MR. BAKER: I just have one more question, I believe, your Honor.

THE COURT: I will get along without it. All right.

Mr. Arrow, directing your states:

"The key to all this, of course, is the fact that we will be restricting our 700 selections to a very small group of publishers, and thus your participation is

As a negotiator for 3M, did you regard this aspect of 3M's negotiations with publishers as an important argument for inducing them to deal directly with 3M?

MR. TOPKIS: Oh, I object.

THE COURT: I don't think the question can be clear until you specify what you mean by this aspect.

You mean the fact that there was an assurance of dealing with a limited number of publishers?

MR. BAKER: The fact that there was an assurance of dealing with a limited number of publishers, the fact that apparently what Mr. Lindgren is representing here is that in direct licensing we will use more of your compositions than we would have if we had not directly licensed.

THE COURT: I don't think you need to refer to Mr. Lindgren's letter for that. If you want to ask Mr. Arrow if that proposition was something he regarded independently as useful, just ask him.

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Mr. Arrow, did you regard the offering of a guaranteed minimum of songs as an important argument in persuading publishers to enter into license agreements for performing rights directly with 3M?

- A You mean at that time?
- Q At that time.
- A Yes, it was certainly an important argument.
- Q Did you ever make that presentation to a publisher!
- A Well, I think we did with every major publisher we approached.

Q Would you relate for us approximately how that presentation would have gone, for example, for Paramount Famous?

THE COURT: I really don't think I have to hear that. It would seem to me that it would be obvious that anybody who was being solicited fo rthis would be more interested if you guaranteed them that you would use 100 songs than if not.

They would be more interested if you guaranteed to use 400, wouldn't they?

THE WITNESS: Surely.

MR. HRUSKA: I think the point, your Honor, is that 3M was in a position to say to each publi ther that 3M approached that had our negotiations with ASCAP

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been successful, then having access to the entire ASCAP repertory ---

THE COURT: Whatever it is you are trying to bring out, I think, is argument. But I am saying I don't need to hear evidence from Mr. Arrow, however particularly special his experience has been, to make me understand that it would be a selling point to make a guarantee to somebody when you are dealing with them.

MR. HRUSKA: The question, your Honor, is the nature of the selling point, the details of the selling point.

THE COURT: If you want to ask if themewere

more details than the guarantee, I am willing to hear that.

I didn't understand that there were.

Q In the course of discussing this aspect of direct licensing with publishers, did you indicate to them that had 3M licensed through ASCAP, a smaller number of compositions would have been used by 3M?

THE COURT: You mean a smaller number of their compositions?

MR. BAKER: Yes, your Honor.

THE WI'NESS: Yes.

Q I believe you testified a moment ago that there
was a second meeting with the executives of Paramount

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Was that meeting also at Paramount's offices?

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Yes.

Q Do you recall who was there?

Pamous on November 13, 1964.

A I think all of the people I mentioned before,
plus Arthur Israel. Assuming he wasn't at the first meeting.

THE COURT: Assuming what?

meeting. I don't recall whether he was or not.

Q Do you recall the substance of the discussions that took place at that meeting?

A No. I don't recall them specifically now.

Q Do you recall anything about that discussion, specific or general?

A Well, I recall having a debate with Paramount's anti-trust counsel, Mr. Timberlake, and I also recall that the meeting ended, I think, on a very hostile note, because of some things which were said during the meeting which had very little to do with the substance of the proposal.

Q Did Mr. Israel indicate to you at that meeting whether he had been in contact with representatives of ASCAP concerning the status of 3M-ASCAP negotiations?

A We might have, but I don't specifically recall.

Q I would like to direct your attention to

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testimony you proviously gave which is at Page 214, beginning with Line 4 and running through Line 17.

I will ask you if that refreshes your recollection.

- A Yes.
- Q And to the extent your recollection has been refreshed, could you tell us what occurred at that meeting?
- Mell, I think it was at the conclusion of the meeting that Mr. Israel indicated to us that he thought we ought to go back and have another try at entering int o an agreement with ASCAP and that he thought that as a result of some discussions he had had with either representatives or directors of ASCAP the situation should be a little easier for 3M from that point forward.
- Q Did Mr. Israel indicate to whom he had spoken at ASCAP?
 - A I don't think so.
- Q Do you recall your next communication with representatives of Paramount Famous after the November 13, 1964 meeting?
 - A I don't recall it specifically, no.
- Q Let me just ask you for the record, do you keep records of telephone calls in your diaries?
 - A No.

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I would like to hand the witness 3M PX20 and ask if that refreshes his recollection concerning subsequent communications with representatives of Paramount Famous.

A Yes, it does.

Q Can you tell us about the communications subsequent to the November 13 meeting with representatives of Paramount Famous?

A Yes. As I told you believe, we were, during this period of time, trying to pressure potential licensors for decisions. Mr. Lindgren was about to begin a series of recordings of the music which 3'd believed it had obtained licenses to, at least in principle and, finally, Ar.

Timberlake called me to tell me that in his compane's view we ought to go back and try to reopen negotiations with ASCAP.

I told him I thought that that was unworkable at that moment.

Q Did you tell him why you thought it was unworkable at that moment?

A I told him some reasons it was unworkable.

First of all, Mr. Lindgren was away and, second of all, by this time, 3M felt it was pretty well committed to the direct license program.

A Well, this was the anti-trust law debate that we discussed before. Mr. Timberlake was questioning the

refresh your recollection?

in this action at Page 213 beginning on Line 16, does that

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right of Famous Paramount to enter auto the egreement 3 with 3M at all and I was trying to convince him that the company did have the right to do so.

THE COURT: As a matter of curiosity, do you recall why he thought they did not?

THE WITNESS: I don't think he considered himself an expert at all in the music industry and he wasn't ready to make a decision on behalf of the company, which might subject it to liability.

I think he had asked me at that time for citations and for an explanation --

THE COURT: In other words, it might have been an excess of caution?

THE WITNESS: Yes. My feeling was he certainly wasn't ready to counsel the company to go ahead with it, unless he was certain that they would not be subjected to liability and, in addition, that they would not damage their position in other ways.

THE COURT: Sounds like a good lawyer.

- In what other ways did he suggest that they might damage their position?
- Well, he felt that the company had a strong position with ASCAP. I think at the time Mr. Israel was

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MR. TOPKIS: No objection, your Honor. (3M PM23 was received in evidence.)

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Honor, I can't see the relevance of this mechanical rights

MR. TOPKIS: If that be the fact, then, your

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license.

THE COURT: I suppose it may be argued that at least this much business was done by the parties and more business might have been done if things had not gome the way they had, to put it in a neutral way.

Is that your argument? What does this prove otherwise?

MR. HRUSKA: Well, I think the fact that publishers who did not deal with 3M directly on performance rights in1964 and 1965 did deal with the exception of Chappell on mechanical rights licenses after 3M and ASCAP could reach an agreement on performance rights.

It is significant for the reasons your Honor suggested.

THE COURT: All right.

Q Did there come a time, Mr. Arrow, in late 1954 or early 1965, when you communicated with a representative of the E. H. Morris Company for the purpose of obtaining performance rights licenses for compositions to be used in connection with the M700 cartridge?

A Yes.

Q And do you recall, was that a telephone conversation or did that involve meetings?

A I think it was a telephone conversation.

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week later that we had a subsequent telephone conversation in which Mr. Gerson advised me that insofar as E. H. Morris entertain.

Q Did he give you any indications as to why he would not entertain it?

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MR. TOPKES: Well, I think the witness has

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already said that he did not make the decision: Mr. Morris made the decision. Mr. Morris' deposition has been taken, your Honor, and he is also available, so far as I know, as a witness.

THE COURT: I am unhappy about getting this information at such a distance. I suppose, however, Mr. Gerson is speaking for the company and I will allow you to ask if he expressed the reasons for the company's position.

A I don't recall specifically that he expressed a reason. He just said that he -- that the company would not entertain the proposal.

Q During your presentation of the proposal to E.A.

Morris, did you indicate to them any of the terms on which

you were prepared to deal with them for performing rights?

A I think we probably discussed the general proposal but most likely did not enter into a discussion of the guaranteed minimum number of compositions.

Q Do you recall giving him an indication of the range of the minimum of compositions you might have been prepared to guarantee E. H. Morris?

A I don't specifically recall.

Q You said earlier that you had regarded Chappell's catalog as a very important catalog.

Did 3M regard the E. H. Morris catalog as an

important catalog?

- A Yes, but not as important as the Chappell catalog.
- O Was it as important as the Leeds' catalog?
- A Possibly.
- Q Can you think of any publisher with whom you did deal which would have been of approximately equal importance?
 - A To E. H. Morris?
 - O Yes.
- A Leeds was, I suppose, approximately equal, from my recollection.

If I were to ask to quantify it, I would suppose that E. H. Morris was somewhere between Leeds and Richmond.

THE COURT: Richmond?

THE WITNESS: Richmond.

we really didn't — I was not authorized to offer a specific number of compositions as a guarantee until 3M's artistic people had been through the catalogs; and we knew that B.

H. Morris was a substantial catalog, but when you ask ne where I would put it, it is very difficult to put it, tecause we never really did examine the catalog, or at least I did not.

Q Did Mr. Gerson at any time express to you the view that 3M's proposal did not involve a sufficient amount

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Morris.

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A I don't think so.

Q Subsequent to this mries of telephone conversations in late 1964 and 1965, did you have occasion to speak with either Mr. Gerson or Mr. Morris concerning the licensing and performance rights for the M700?

A Yes.

Q Was it Mr. Morris or Mr. Gerson?

A Mr. Morris.

Q Do you recall approximately when that would have been?

A It was over a period of time during the meetings between ASCAP representatives and 3M.

Q Was Mr. Morris there as a representative of ASCAP, do you know?

A Yes, he was.

Q What was the subject matter of these meetings?

THE COURT: What was the subject matter of what?

MR. BAKER: The meetings.

THE COURT: You are not talking about the meetings as distinct from the discussions with Mr. Morris?

MR. BAKER: The meeting at which he met Mr.

Q In 1968, did you say?

Q At a later time?

I didn't say.

A I would really have to check my diary to find the first date that I met him. I would guess from the outcome that it was probably late 1967 or early 1968.

Q During this meeting in late 1967 or early 1968, do you recall the subject matter of the discussions?

A Yes, at that time 3M was entertaining once again the posit of obtaining a direct—obtaining a blanket license or a license from ASCAP covering the 700 program and the possible new program which 3M then had on the drawing board.

We had been encouraged to neet with ASCAP once again by the American Guild of Authors and Composers, and had had a preliminary meeting at ACAC's offices which resulted in a series of meetings at ASCAP.

Finkelstein or to Mr. Korman or both that we had become concerned that we were meeting only with the administrative people of ASCAP and that we thought It was better from our point of view that we broadened the nature of the meeting to—or broadened the attendance of the meeting to include persons who were ASCAP members or directors.

Mr. Finkeistein agreed and Mr. Morris was one

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O.

I think he was present at just about all of the meetings subsequently.

Q I would like to now hand the witness 3M PX 39 and ask him if this is an agreement between 3M Corporation and the Edwin H. Morris Company concerning the licensing of mechanical rights to the M700?

A Yes, it is.

such director present.

MR. BAKER: I would like to offer it into evidence at this time.

THE COURT: For the same purpose as the last one, I take it?

MR. BAKER: Yes, your Honor.

MR. TOPKIS: If your Honor pleases, this is a 1969 agreement, and I would just observe that of course at automatic license under the statute would have been every bit as good so the purpose for which it is apparently offered, namely that these publishers would deal, is not proven.

They had no choice but to leal.

MR. HRUSKA: I think the purpose here is a little more specific than that, your Honor. This deals with a deposition of Mr. Morris in which Mr. Morris, over the course of many pages, made the point that he did not --

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reports of what is in depositions of witnesses that are not testifying. You have offered it and I will accept it for whatever, and you can argue its purpose or its probative value at the proper time, and Mr. Topkis can argue, of course, that it has not been.

(3M PX 39 received in evidence.)

Mr. Arrow, do you recall the terms of the agreement with Edwin H. Morris? Specifically, do you recall whether the mechanical rights were obtained for five dollars per composition regardless of --

THE COURT: Isn't that specified by the agreement?

MR. BAKER: It is but it is a prefatory question, your Honor.

THE COURT: Just tell him what it is then.

- Q I believe that it is \$5 per composition regardless of the number of tapes sold.
 - A It is \$5 per composition per year.
- Q Per year. Do you know of any statutory right on which 3M would have to obtain compositions on those terms?
 - A No.
 - Q Thank you.

Did there come a time, Mr. Arrow, in late 1964 or early 1965 when you approached representatives of the

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Big Three, sometimes referred to as Robbins, Miller & Feist for the purpose of obtaining perforamence rights licenses for the M700 cartridge?

- A Yes.
- Q Do you recall the date of your first conversation with the representative of the Big Three?
 - A No.
 - Q Do you recall with whom you spoke?
 - A I spoke with Mr. Maxin by telephone.
 - Q Did you discuss the usual topics with Mr. Maxin?
 - A Yes.
 - Q What was Mr. Maxin's response?
- A I believe at the end of our first telephone conversation Mr. Maxin indicated to me that, as I recall, he had just become a director of ASCAP or was about to become a director of ASCAP. He indicated to me that he wanted to find out more about it and he would let me know.

Subsequently, either I telephoned him or he telephoned me and he indicated to me that he was not prepared, on behalf of the Big Three, to enter into this kind of agreement with ASCAP -- with 3M, rather.

Q Did he at any time indicate to you a willingness to bring up the subject matter of the ASCAP-3M negotiations at an ASCAP board meeting?

A Yes, I think he said that.

Q Did he indicate to you any other reasons that concerned his attitude toward dealing with 3M directly for peformance rights?

A You mean did he indicate any reason why he was not prepared to recommend the agreement?

Q Yes.

A He indicated to me that he thought it would be disloyal.

Q Did he elaborate in any way as to what he meant by disloyalty?

A No.

Q Did he indicate disloyal to whom?

A Either he said or I assumed that he meant to ASCAP.

THE COURT: Did he make it clear whether he felt that it would be disloyal to him as a director of ASCAP to take such steps, or for him and the Big Three as publishers, to take such a step?

Maybe I am making an unnecessary distinction but was there any indic tion?

THE WITNESS: I don't recall whether he made the distinction.

THE COURT: That is what I am asking.

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THE WITNESS: I don't think he made any distinction. I think that he felt they were the same.

Q Do you recall whether the Big Three granted a mechanical rights license to 3M in connection with the 3M 1200 program?

A I think so but I don't recall specifically.

Q Did you have occasion to discuss direct licensing of publishers by 3M with Mr. Jack Bregman or Bregman, Vocco, Conn?

A I don't recall speaking with him specifically.

I have been told that other members of the 3M staff did.

Q I take it that you did not approach Mr. Bregman inconnection with obtaining performance rights license for the M-700 cartridge?

A No, I did not.

Q Did you have any discussions with him concerning the obtaining of mechanical rights licenses for the M500 cartridge?

A The M500 cartridge?

Q Yes, sir.

A No, I don't think I did.

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I would like to direct your attention to the testimony previously given in this action between Pages 240 and 245 of your deposition and ask you if that refreshes your recollection with respect to whether you had any conversations with Mr. Bregman concerning the licensing of mechanical rights for the M500 cartridge?

MR. TOPKIS: M500?

MR. BAKUR: M500.

MR. TOPKIS: Could I know the time span of this? When was the M500?

MR. BAKER: Well, I can put that on the record.

Ω Mr. Arrow, before you do that, can you tell us what the M500 program was?

A Yes. The M500 was a modification of the M700 machine but it was designed to contain 500 selections of music, it was designed for use in the home.

Q Are performance license rights required for the M500?

A No. Mr. Baker, I think part of the reason for the confusion is that my discussion with Mr. Bregman had nothing to do with the M500 at all. It had to do with something called the M2.

THE COURT: That is not a rival, though, is it?
THE WITHESS: No.

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MR. TOPKIS: It is designed for use in the

MR. BAKER: Your Honor, this is a kind of

complex passage and if I could, I would like to ask for
a ten minuto recess or use the afternoon recess while I

sort it out.

THE COURT: All right.

(Recess.)

Q Directing your attention to your prior testimony at Page 243, beginning on Line 8, I would like to ask you whether that refreshes your recollection as to whether you had a telephone conversation with Mr. Bregman.

MR. TOPKIS: In what section? I am sorry.

Q In connection with a special program undertaken by 3M and Mr. Bregman's attitude toward direct licensing by publishers of the M700 project.

THE COURT: About the M500?

A Yes. As I indicated to you before, we did not have a conversation with respect to the M500. We did have a conversation with respect to the M2.

Q Can you tell me the circumstances which led to your conversation with Mr. Bregman concerning the M2?

A Yes. I had been told by another 31 representa-

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MR. TOPKIS: Could we know the approximate date before we go farther?

THE WITNESS: I think this was in January of 1965, on or about.

A I had been advised by Mr. Selvin, an employee of

3M, that in his attempts to obtain ordinary mechanical

licenses from Mr. Bregman's company, Mr. Bregman had indicated

to him that --

MR. TOPKIS: Excuse me. May I interrupt the witness, your Honor? I take it we are about to hear some hearsay which I would rather not have spread upon the record.

THE COURT: I can't accept it, obviously, for the truth of the statement.

Can't you just go on to whatever your conversation with your 3M employee prompted you to do?

MR. BAKER: Your Honor, the statement is not offered for its truth but is simply offered to provide context for the telephone call which Mr. Arrow placed to Mr. Bregman.

MR. TOPKIS: Couldn't we just hear about the telephone call, your Honox?

THE COURT: Yes. I don't think I need to know

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what everybody said to everybody.

Somebody gave you some information which you had at the time you called Mr.B regman, and you were prompted to call him, is that right?

asked him whether he was prepared, on behalf of his company, to issue ordinary mechanical licenses to 3M with respect to its M2 program and he said that he was not refusing to do so.

THE COURT: Not what?

THE WITNESS: Refusing to do so.

the refusal of performance rights did not necessarily include the refusal of mechanical rights.

THE WITNESS: One thing had nothing to do with the other. The M2 had nothing to do with performing right.;

THE COUR!: Did he literally use the words that e was not refusing to?

THE WITNESS: He said he would do sc.

Q Did you discuss with Mr. Bregman the subject of the license of performance rights for the M700 cartridge directly by publishers in the course of that conversation

A Yes.

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2 And can you tell me the substance of that 2 discussion? 3

A Yes. Mr. Bregman indicates to me that he thought it was wrong for 3M to obtain or attempt to obtain licenses to perform music directly from music publishers.

I think that he said that his company was not prepared to issue such licenses but that he would not withhold ordinary mechanical licenses from 3M for this other program.

Q Did M. Bregman indicate to you why he thought it was wrong for 3M to deal directly with publishers?

A I believe he indicated that he thought the performing rights should be licensed through performing rights associates and that that was ASCAP's area of competence

Q In late 1964 or early 1965, did you have any discussions with any representatives of the Inving Berlin Music Company with respect to the licensing of performance rights in connection with the M700 project?

Yes. A

And with whom did you discuss that?

Mr. Theodore Jackson. A

Would you identify Mr. Jackson for the record, Q please?

Mr. Jackson was then a practicing attorney in A

New York.	I think he was a	member of the	firm of
Gilbert & G	ilbert, and his fi	rm represented	Irving Berlin
Music, Mr.	Berlin and I think	other companie	s in the music
industry.			

Q Do you recall the substance of that discussion, other than the usual presentation?

A I don't think it was necessary to make a presentation to Mr. Jackson. He was already familiar with the program. One of his other clients had entered into a licensing agreement, and I indicated to him that 3'l would be interested in dealing with Berlin.

Mr. Jackson told me he would talk to his client and eventually he returned or he telephoned me or I did him and told me that Pr. Berlin had said that he was not interested in entering into a license agreement with 3M.

Q Did Mr. Jackson --

MR. TOPKIS: Excuse me, your Homer. I will move to strike so much of that as purports to be a magnation of what Mr. Berlin said.

Mr. Berlin was not a member of our loard, not an office of ASCAP, nor was Mr. Jackson. Mr. Jackson was a lawyer and I am, again --

it is taken for the state of somebody's mind, but I don't know whose mind it would be unless it was Mr. Berlin's, but --

MR. BAKER: Could I ask Mr.Arrow whether Mr.

Jackson was dealing on behalf of the Irving Berlin Publishing Company?

THE COURT: Well, nobody doubts that or that they refused to enter into a license agreement.

MR. BAKER: Well, if Mr. Jackson was representing the company, I assume that he could speak for the company.

THE COURT: Yes, I think he could, too, but all he could do was say that the company was not interested.

MR. BAKER: If I can get it that the company was not interested, instead of Mr. Berlin was not interested, I would be happy.

THE COURT: All right.

Q Mr.Arrow, was Mr. Jackson speaking on behalf of the company?

A I presume so.

Q Did he give you any reasons as to why the company was not entering into such an agreement?

A I believe he expressed the reason that the company or Mr. Berlin or both were not interested in licensing

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performing rights except through ASCAP.

Q Did 3M subsequently enter into an agreement with the Irving Berlin Music Company with respect to the M1200 series for mechanical rights?

A Yes, we did.

Q I would like to hand you a copy of 3M PX41 and ask you if this is a copy of that agreement.

A Yes.

MR. PAKER: I would like to offer it in evidence at this time.

other than those previously indicated.

MR. TOPKIS: That is right, your Honor.

MISS KEARSE: Yes.

THE COURT: Let me comment on this, though, and

I have no objection to receiving the evidence but unless

you intend to refer in particular to the terms of the

agreements as distinct from the fact that the agreements

were entered into, I trust that you won't dump them in my

lap at some future time.

MR. BAKER: Your Honor, that is correct. This agreement has a modification which is not present in some of the other agreements and in some cases there are

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2A 25 certain aspects of it which will be eventually r eferred to in argument or proposed findings of fact.

THE COURT: I see.

(Exhibit 3M PX41 was received in evidence.)

Mr.Arrow, did you have any discussions with representatives of the music publishers holding company concerning the licensing of performing rights for the first series of the M700 cartridge?

THE COURT: That is MPHA?

MR. BAKER: MPHC.

A Yes.

Q Do you recall approximately when those discussions occurred?

THE COURT: Am I correct that this company owned Harry Fox?

MR. HRUSKA: No, your Monor. That is the Warner
Brothers Music Publishing Company. The Harry Fox is
owned by the National Music Publishers Association, which
is a trade association.

THE COURT: All right.

A According to my diary, we met at MFHC's offices on October 28.

Q 1964?

A 1964.

the MPHC representatives at that meeting?

A I think, according to my recollection, MPHC was the first company we met with after Chappel and I believe we regarded MPHC as the secondmost important library of music within the ASCAP purview and we probably dealt with the subject more extensively or at least at greater length than we did with some of the others.

Q You dealt with the usual subjects in your presentation?

A Yes.

Q Do you recall what the response of the MPRC was, or the representatives of MTHC, at that meeting to your presentation?

A Well, Mr. Lee indicated to us that he was not in a position to make a decision, that the eventual decision on the subject would have to be made by Mr. Herman State and that unfortunately Mr. Starr was ill.

He thought that he would have an opportunity to discuss it with him and asked us to please be patient while he tried to do so.

Q When fid the next communication between representatives of 3M and the representatives of the Music Publishers Holding Company occur?

A I don't recall, but at some time we became aware of the fact that we could not make an agreement with

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MPHC, and we just went on without them.

THE COURT: Is that a nice way of saying they told you they weren't interested?

THE WITNESS: I am not sure that ever happened, your Honor.

THE COURT: How did you learn that you couldn't make a decision.

from his illness and Mr. Lee could never make a decision while Mr. Starr was alive and by the time Mr. Starr died and the replacement was appointed, the boat had sailed.

THE COURT: I see.

Q Did you have any discussions with Mr. Lee or other representatives on the subject of whether there was anyone other than Mr. Starr who could deal on behalf of MPHC for performance rights?

A I know I asked that question of Mr. Lee and I think the answer was no, it had to be Mr. Starr during that period of time, he was just incompetent to make a decision.

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- Did Mr. Lee give you any reasons as to why it had to be Mr. Starr at that time?I understood he was the boss.
- Do you recall the number of songs that 3M was prepared to guarantee to MPHC?

MR. TOPKIS: If your Honor please, that is totally irrelevant in this current state of the record.

THE COURT: I am sorry, I didn't hear the question.
Repeat it.

O Do you recall the number of songs which 3M was prepared to guarantee to Music Publishers Holding Company that it would use on the first series of M700 tapes?

of times. Is it any different from this company than the others? Just ask him what guarantee 3M was proposing to give

THE COURT: Did vou make any offer?

MR. TOPKIS: If they made any offer.

THE WITNESS: Yes, I am sure we did.

THE COURT: Do you remember how much the guarantee was?

THE WITNESS: I think we were prepared to guarantee MPHC 200 compositions.

THE COUFT: Have you got many publishers to go?

MR. BAKE: After the MPHC, your Honor, I believe

we have two.

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Mr. Arrow, I believe you previously testified thatin your discussions with publishers, that the guarantees were based upon the assumption that 3M would sell a minimum of 6.000 tapes a year. Was that correct?

A. That's not quite what I said. I think the assumption was that 3M would sell 6,000 tapes the first year.

- O The first year?
- A. Yes.
- O That was the minimum number of tapes 3M would have to sell to meet the guarantee; is that correct?

MR. TOPKIS: What guarantee?

THE COURT: Your guarantee, if you made any in any case, wasn't conditioned on your selling that, was it? It's just that you estimated in your own mind that figure as a basis for making the guarantee?

THE WITNESS: That's correct.

0 Did you also estimate in your own mind what you anticipated the sales of 3M cartridges would be during the first year?

THE COURT: Unless that was communicated to the publishers, I don't see how it would have any bearing.

MR. BAKER: That is the next question, your Honor.

A The sales department at 3M communicted to me that

they thought they would sell a minimum of 6,000 cartridges during the first year of operation.

a Did they indicate to you the median number of cartridges they expected to sell, what in fact their projections were opposed to minimum projections?

A No.

THE COURT: Did 3M sell the mechanism to play this tape as well as the cartridge itself?

THE WITNESS: Yes.

Q Did the MPHC subsequently enter into a mechanical rights license with --

MR. TOPKIN: Before we go into that, I move to strike this business about what the 3M sales staff told Mr. Arrow. There isn't a necessary predicate for it, namely, that it was communicated to some publisher.

THE COURT: Sustained. I mean I will either sustain your objection or simply say that it doesn't mean anything, that they told him that.

MR. TOPKIS: I am content.

O Do you recall whether the Music Publishers Holding company granted a mechanical rights license in connection with the M1200 project?

MR. TOPKIS: Your HOnor, I suggest that is irrelevant. This record at the moment is that Mr. Starr was

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incapable of making a decision, so what difference would it make about what they did about mechanicals four years later after his death?

THE COURT: I will get the full picture on each publisher. I am inclined to agree with you, but I don't see how it can do any harm to get the full picture.

MR. TOPKIS: To make it easy, if Mr. Baker will tell us that that is the fact, I will scipulate it.

THE COURT: Let's get it cut one way or the other, gentlemen. Did they?

THE WITNESS: Yes, they did licence 3M in connection with the 1200.

on Thank you. Did you have any contacts with representatives of the Richmond organization for the purpose of discussing the licensing of performance rights for the

A. Yes.

0 Do you recall when the first such contact occurred?

A I think the first such contact occurred on the street. I met Mr. Brachman.

THE COURT: On your way from one meeting to another?

THE WITNESS: I think it was on my way to the office.

as a matter of fact, but I don't recall precisely when that

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was. Subsequently, as a result of that meeting, we exchanged telephone calls, and eventually met in person. I am looking for the date

- Q May 5, 1965?
- A Yes, I sse that we met on May 5, 1965.
- O Do you recall who was present?
- A. Mr. Richmond, Mr. Brachman, I was present, and I am not sure whether Mr. Bergman was present or not.

THE COURT: Mr. Lindgren was not there?

THE WITNESS: I don't think so.

THE COURT: Bergman would be of Richmond?

THE WITNESS: Yes.

- O. Do you recall Mr. Bergman's position at that time?
 - A. I think he was resident counsel.
 - O. What was Mr. Brachman's pos ition?
 - A. General manager or --
 - O. And Mr. Richmond?
 - A. He was the head of the company.
- Q Can you describe your discussions with Mr.

 Brachman prior to that meeting concerning the license of the M700 project?
 - A Well, I had the same discussion with him that I did with other publishers, and indicated that 3M would

I don't recall specifically why we met with him as late as
May 1965 rather than earlier, but it's possible that

3M was doing additional recordings at that time or was
contemplating it and we might haveneeded some more music.

n Do you recall whether there were any additional discussions of substance at the meeting on May 5, 1965?

how many compositions 3M was willing to guarant ee to use, and either by that time or shortly afterwards we had their catalogue run through by 3M's music personnel, and either at that meeting or at a subsequent meeting we found ourselves in total disagreement with respect to the number of compositions to be used.

THE COURT: You mean to be guaranteed?
THE WITNESS: To be guaranteed, yes.

Q I would like to show the witness at ti this time 3MPX47 and ask him if he can identify it.

A. Yes.

O Is this a letter received by you from Mr. Schulman of the Richmond organization?

A. Yes.

THE COURT: What is the name?

THE WITNESS: Allan L. Schulman.

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MR. BAKER: Your HOnor, I would like to offer it in evidence at this time.

MR.TOPKIS: No objection, your Honor, again for the usual limited purpose of course.

THE COURT: Received as indicated.

(3MPX 47 received in evidence.)

p Directing your attention to the first paragraph of that letter, did you have any discussions with any representative of TRO regarding the marter of policy referred to in the next to last line in that paragraph?

THE COURT: You say representative of TRO?

MR. BAKER: Yes, I am sorry.

THE COURT: What is that?

0 Mr. Arrow, is the Richmond organization sometimes referred to as TRO?

A. Yes.

THE COURT: The Richmond organization?

MR. BAKER: Yes.

THE COURT: I though you were referring to temporary restraining order.

THE WITNESS: What was the question?

O The first paragraph of this letter from

Mr. Schulman reads, "After giving serious consideration to

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bility that our clients should be interested in, so I

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believe I called Miss Cheiman of Frank Music organization, and I probably called one or two other executives in the company, and asked them to meet with me and with Mr. Lindqran.

0. Who was Miss Chieman?

- A She was the treasurer of Frank Music Corp.
- 0 Do you recall the names of the other two executives?
- A. I think I probably communicated with Mr. Mil:
 Kramer.
 - 0. Who was Mr. Kramer?
- A. I think he was at that time either a vice president of the company or the professional manager of the company or both, and I might ave communicated with Mr. Whitehead who was also a vice president of the company.
 - Q. Were either of them present at the meeting?
 - A not at the first meeting, no.
- O. Do you recall whether Mr. Harold Ohrenstein was present at the meeting?
- A. He probably was but I don't specifically recall.
 - Q Could you simply identify him for the record?
- A. He was my partner and he was also the secretary of Frank Music Corp. and a director of the company.

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Other than your usual presentation, did you make any specific or unusual points in your first meeting with Miss Cheiman?

- A. I don't think so.
- 0. What was the status of the discussions when the meeting was adjourned?
- A Miss Cheiman indicated that she would discuss the matter with he other persons in he company. Mr. Kramer and Mr. Whitehead, Mr. Loesser, and would let us have their decision.
 - Q Could you identify Mr. Loesser?
- A He was the president and sole stockholder of Frank Music Corp.

THE COURT: Is that Frank Loesser?

THE WITNESS: Frank Loesser. He was a gifted compose, producer, author of mlays.

- a Do you recall when your next communication took place with representatives of the Frank Music company?
 - A I don't recall specifically, no.
- Q I would like to show the witness at this time 3MPX42 and ask him if he can identify that document.
 - A Yes, I can.
- Q Is that a memorandum written by you and addressed to Mr. Milton Kramer of Frank Munic?

-

Yes.

MR. BAKER: I would like to offer it in evidence, at this time.

MR. TOPKIS: I object, your Honor. A memo from Mr. Arrow to a Mr. Kramer of Frank Music, not a party to this litigation.

THE COURT: For what purpose is it offered?

MR. BAKER: It's offered simply to show what Mr.

Arrow said to Mr. Kramer of Frank Music in the course of
these negotiations concerning the acquisition of performance
rights for the M700 project.

than by testimony unless counsel for defendants have some reason to believe that Mr. ARrow's testimony might be different or want to cross examine him on that, bt we can do it either way. Of course, it's not binding on -- I mean I don't see how Mr. Baker can contend it's binding on ASCAP. He is trying to create a description of what he believes to have been industrial conditions at that time, and we will all have to see what they add up to in the total picture.

MR. TOPKIS: All right.

THE COURT: Miss Kearse?

MR. TOPKIS: I am particularly concerned, your Honor, because there is a sentence in here which I will read to

you. It reads, "We have learned that ASCAP has been approaching its own members to advise them not to deal with 3M." That is of course --

ment as proving the truth of that assertion. I can only accept it for the purpose of indicating the fact that Mr.

Arrow communicated that thought to the addressee or the recipient of this memorandum.

MR_. TOPKIS: For that very limited purpose, then.

THE COURT: Miss Kearse, Does it say masty things
about BMI too?

MISS KEARSE: Certainly not, your Honor. It justs
seems to me that the proper way to get this is through testimony and if that has to be used to refresh Mr. Arrow's
recollection, so be it.

on that, I am not criticizing you for it; I will back you up.

It may be a question of whether that is really necessar,

since we have had long rather tiring testimony, but would
you want to push that point?

MISS KEARSE: I just prefer that the document not be admitted into evidence since I feel it's inadmissible.

THE COURT: All right, question the witness then.

MR. HRUSKA: Your Honor, may just say one word

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1	mpb13	Arrow - d	irect	1428
2	on this docu	ment? I won't	describe the c	contents other
3	than to say	it's a statemen	it made by Mr.	ARrow to Mr.
4	Kramer at th	nis point in time	regarding the	proposal that
5	3M is making	g to Frank Music.	I submit, yo	our Honor, that
6	the best, mo	ost competent evi	dence regardin	g the statement
7	made to Fran	nk at that time i	s this documen	t, not Mr.
8	Arrow's reco	ollection of it ye	ars after the	event.
9	A13	we are offering	this for is t	he fact that
10	this memo wa	s sent by Mr. Ar	row to Frank.	
11	THE	COURT: If pu ar	e only trying	to show that the
12	memorandum /	was sent		
13	MR.	HRUSKA: And th	e statements i	n the were
14	memo were ma	ade by Mr. Arrow	to Frank.	
15	THE	COURT: I think	it 's com	petent for that
16	purpose, Mis	s Kearse.		
17	MR.	HRUSKA: That is	the purpose o	f the offer,
18	your Honor.	It is limited t	o that.	
19	THE	COURT: All righ	t, received on	that basis.
20	(3M	PX42 received in	evidence, as	indicated.)
21	a	Mr. ARrow, dire	cting your att	ention to the
22	first paragr	aph of that		
23	THE	COURT: This is	what bothers m	e. I think we
24	are neither	fish nor fowl. F	irst you are t	rying to show the
25	he wrote the	memo and then y	ou ze	questioning him

as to it. Why don't we do one or the other?

that he made the statements. Then there are cortain questions
I would like to ask him concerning the statements involved
here, in some instances whether it refreshes his recollection,
whether he had a conversation with Miss Cheiman at such and
such a time, on other cases to explore in greater depth
some of the statements made.

of questioning seems always to assume that the witness won't recall and to tell him what the memorandum says, and then ask him. I agree we may be kind of fussy, but if you are going to ask him what he wrote in the memorandum, you don't need to because it is in evidence. If you are going to ask him about something else that occurred, just ask him, and if he cannot remember, he can look & it.

MR. BAKER: Your Honor, my recollection is before I asked him whether he would recall when his next communication with a representative of Frank Music occurred, and I believe he stated he could not recall.

THE COURT: And you . are going to refresh his recollection on the matter?

MR. BAKER: Yes, sir.

THE COURT: All right.

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O Directing your attention, Mr. AProw, to the first paragraph of the memorandum, do you recall whether you had a telephone conversation with Mr. Kramer during the week preceding the writing of this memorandum?

A Yes, I had a telephone conversation with him in the week preceding the date of this memorandum. I think it would be fair to say I had several conversations with Mr. Kramer in the week before this initial date of our meeting with Miss Cheman and the date of this memorandum.

THE COURT: What is the date of the memorandum?
THE WITNESS: December 28, 1964.

MISS KEARSE: Your Honor, I object to testimony as to what was said at those meetings unless -- well, on the ground that Frank Music, neither Frank Music nor Mr. Kramer were a party to this action; unless some party was there against whom it is being offered I think it is inadmissible.

MR. BAKER: The connection with the case, your Honor, is I believe more is at issue here than whether the ASCAP directors or the named BMI defendants would be willing to deal in a direct licensing situation.

Arrow-direct

THE COURT: As part of the total picture in the industry?

MR. BAKER: Of course.

MISS KEARSE: If Mr. Baker wants to prove that Frank did not enter into an agreement with 3M, that's one thing; or, if he wants to prove that he did, that's another thing but here I don't think we have to get into discussions which are clearly hearsay.

THE COURT: Well, they are not hearsay when reporting that people talked about certain subjects: that is not hearsay, when it's reported by one of the persons who was there, but the probative value may be an entirely different thing and I am far from decided about that.

MISS KEARSE: Certainly what persons other than the witness said in these conversations would be hearsay.

THE COURT: No; not that they talked about those things.

MR. BAKER: I think it's probative as to the state of mind in the course of the meetings.

THE COURT: If Mr. Arrow were to report that somebody yelled fire in this courtroom, that wouldn't be hearsay, if it were put in for the purposes of indicating that the man though! there was a fire. It might be hearsay to prove that there was a fire and I will receive it, but

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I hope to make clear that I have no view at all as to the probative value of this material at this time.

MISS KEARSE: Well, I would note my objection to the relevance of the offer for the purpose that various things were discussed.

THE COURT: I understand.

Q Let's see if I can recall the question. I think it was --

THE COURT: You asked him what was discussed at the meeting.

No. What was discussed in the series of telephone calls or conversations prior to writing this
memorandum.

A I was trying to get Mr. Kramer to take a position either affirmatively or negatively with respect to the 3M proposal and I was trying to get him to do it before approximately January 1st, 1965, because that was the date on which 3M was pretty much going to lock the library in

I indicated that to Mr. Kramer on more than one occasion and could not induce him to make a decision. Finally, at one point I became concerned that perhaps he really didn't understand the proposal at all and it might be advisable to put it in writing and make sure that there was communication with those persons who could make the

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decision on behalf of Frank Music, so I wrote this memorandum.

Do you recall the number of compositions which 3M was prepared to guarantee to Frank Music?

MR. TOPKIS: I object to that, your Honor. I would not object to the question "what did you offer them," but what they were prepared to offer is irrelevant.

- What did you offer them? MR. TOPKIS: If anything.
- I think it was 25 or 30, as a minimum guarantee.
- Do you recall any discussions with Mr. Framer subsequent to writing this memorandum?

A At one point, I am not certain what the exact date was, he called me or wrote to me and told me that Frank Music Corp was declining.

Q Did he give you any reasons?

MR. TOPKIS: Your Honor, there is a written communication and I don't see any point in speculating about it. It's 3M PX 43 for identification, I believe.

THE COURT: We are right back to the same question that we always have. I will receive it because I have been receiving them. It will be consistent but I am concerned, I must say, about this kind of proof and it is hard to say that you are just offering this evidence to

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show that Mr. So and So said it. Obviously, you must be offering it for trying to persuade me that they believed what they said and I have serious questions as to whether it is competent testimony, but we will have to argue some of these things out later on.

Let's hear it.

MR. TOPKIS: Well, your Honor, I would press my objection on the ground that it is not the best evidence.

We have the written communication. That is better than this witness's festimony.

THE CCURT: Written communication from whom to whom?

MR. TOPKIS: From Mr. Kramer to Mr. Arrow, saying "thanks, no," and other things.

THE COURT: I don't know that that expresses all the reasons that he had. There may be something not in there.

MR. TOPKIS: But the witness has testified that he can't remember whether it was written or oral and we have the writing and we certainly should pursue the writing.

THE COURT: Did you say you couldn't remember whether it was written or oral?

THE WITNESS: I don't think I specifically said that. I think I said I don't recall whether he told me

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first in writing or orally that they were declining.

THE COURT: The next question was whether he gave you any reasons. I don't think you ever got to answer that question, did you?

THE WITNESS: Do I have to answer it?

THE COURT: Do you have to answer it?

Is that what you are asking me?

THE WITNESS: Yes.

THE COURT: Yes.

THE WITNESS: The only reason he gave me is expressed in the writing.

advised by a good law firm like yours and he didn't com-

Q Mr. Arrow, I believe you just stated that the only reasons which were expressed to you were those set forth in the document referred to by Mr. Topkus as 3M PX 43.

THE COURT: He didn't say the document. He said they were in writing.

A Whether or not I answered the question that way, I think that that is the case.

Q Well, let me show you the document. I am seeking to determine whether the reasons set forth in PX 43

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are the only reasons communicated to you as to why Frank Music did not want to enter into an agreement with 3M for performing rights to the M-70% cartridge.

A Mr. Baker, I think it's important to place it in content of time. Now, on January 3.2, 1965, which was the date of the writing of this memorandum, received by us the next day, this was the reason which was given to us.

Subsequently, we discussed it with Mr. Kramer again and at that time he broadened or at least he elaborated on the reasons expressed in this memorandum, which is not to say that he gave us additional reasons, but he rather explained this one.

I must say that we did not push Frank Music

Corp as hard as we might have pushed a stranger because we

were in a conflict position and we were being very cautious

in our approach to a client.

I think had the client been in a position of earning a million dollars, certainly we would have been more aggressive.

THE COURT: Aren't we getting a limite off the track, as interesting as it is?

MR. BAKER: I don't believe so, your Honor. He said there were some other reasons given subsequent to the writing of this.

THE COURT: I understood that he said they elaborated on this reason.

THE WITNESS: I think it became clear that Mr.

Kramer would have agreed to the program, had Frank Music

a more substantial interest in it.

THE COURT: You mean it would have gotten more money out of it.

THE WITNESS: Yes; would have gotten more money.

Q Do you recall any other reasons?

A No.

Q I would like to direct your attention to page 264 of the deposition you have previously given in this action, beginning on line 9 and ask you whether that refreshes your recollection as to wany additional reasons.

A I don't see that this testimony is in any way a departure from what I just said.

THE COURT: Let's not argue about it. It does not refresh your recollection as to other reasons; is that what you are saying?

THE WITNESS: No. Right.

MR. BAKER: I would like to offer 3M PX 43 in evidence at this time.

MR. TOPKES: Oh, I object, now, your Honor, both ways -- one way too many. This is just --

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Arrow in words what the objection was and I would like to know by the document or by the testimony.

All he said was that it was expressed in writing and it was elaborated later on.

MR. BAKER: And I have asked the cuestions -THE COURT: Well, he did say that he thought
they would have gone into it if there had beer more money
in it but he didn't say that was the objection.

it. I don't know what all this means, frankly, but I will accept the document.

(Exhibit 3M PS 43 received in evidence.)
THE COURT: Now I can find out.

MISS KEARSE: Are you admitting this, your

Hono, for the truth of the matter stated or for the limited

purpose?

MISS KEARSE: For that limited purpose?

THE COURT: I am admitting it as the thing that Mr. Framer said to Mr. Arrow.

THE COURT: All these documents are received for that purpose. I will have to admit that I am human and if a man puts this down on paper, there may be some reason to believe that he believed it but --

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Arrow-direct

Q Mr. Arrow, did Frank Music Company subsequently enter into an agreement with 3M with respect to performance rights for the M-700 second series?

A Yes.

THE COURT: I should make it clear that I think
we are all going to have to agree, before the record is
closed, that some of these publishers did feel out of
loyalty or whatever it was to ASCAP, that they didn't
want to go along with this proposition and I by no means
feel that is conclusive of the issues before me.

Mr. Finkelstein or because somebody's hair was red. The question is what the significance of all that is when we have the whole picture and I say that so that the defense counsel don't need to be overwhelmingly concerned about each piece of paper that comes in.

MR. TOPKIS: Just so that your mind isn't poisoned overnight, the first sentence of the document that you have just read was a joke and there is no question about it.

MR. HRUSKA: Your Honor, I dispute that. At the deposition there is testimony that I believe contradicts that statement.

THE COURT: All right. I have said many times

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that I don't take counsel's statements as being evidence and I am sure Mr. Topkis, who is a specialist in humor anyway, will be able to prove how it is a joke.

MR. TOPKIS: I welcome that being spread on the record, your Honor.

MR. HRUSKA: Deadpan as I am, your Honor, I will disprove that.

THE COURT: All right. Let's go along.

Arrow- direct

THE COURT: I am hoping we will be able to finish Mr. Arrow's direct testimony by the end of the day. Can we do that?

MR. BAKER: Not unless we plan to be here for quite some time, your Honor.

THE COURT: Are you on schedule with regard to his testimony?

MR. BAKER: Well, I didn't have a schedule. I am about two-thirds to three-quarters through and I think the latter part of it will be considerably faster than the early parts.

THE COURT: I would like Mr. Hruska tonight to confer with his team and give us an estimate tomorrow as to whether they are on schedule and if not, what we can do to try and catch up.

Mr. Arrow, prior to November 15, 1965, did you have any discussions with any representatives of AGAC relating to the direct licensing of performance rights by 3M?

THE COURT: That is November 1965?

MR. BAKER: November 15, 1965, yes, your Honor.

I don't know what the significance of that date is.

I would like to hand the witness 3M PX 27. Q I understand it's already been placed in evidence.

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subjects that were discussed?

THE WITNESS: He asked me a couple of questions

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asked, but he appeared to be soliciting some information, and I answered his questions.

That was the only communication I believe I had before the writing of this letter.

about the 3M program. I don't recall specifically what he

Q From whom did you receive copy of the letter
3M PX 27?

A I think I received it from one of the publisher licensors or perhaps more than one.

Q Did you receive any communications from publishers regarding the subject matter of this letter?

A Yes.

Q Do you recall which publishers?

A I recall receiving a letter from Mr. Eastman on behalf of the group of panies which he controlled.

I believe I heard from someone representing Bourne Music, either Mr.Jackson or Mrs. Bourne.

MR. TOPKIS: I'm sorry, I missed those words.

THE WITNESS: Either Mr. Jackson or Mrs. Bourne.

A I think I heard from Mr. Brettler. I recall discussing it with Mr. Chiantia although I don't remember whether I called him or he called me, and I heard from

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Acuff-Rose publications, I think in writing.

Q Your communication with Mr. Eastman, do you recall whether that was by telephone or by letter?

A It was probably both.

MR. TOPKIS: I thought the witness testified it was a letter.

THE WITNESS: I think I received this by letter and I think we subsequently had a telephone conversation.

MR. TOPKIS: I beg your pardon.

Q Who is Mr. Eastman?

A Mr. Eastman is and was a lawyer practicing in New York City who is also a proprietor of or at least the principal of a number of publishing companies.

THE COURT: Is that Lee Eastman?

THE WITNESS: Lee Eastman. Scarsdale.

Q You said Mr. Eastman was a principal of some publishing companies.

Was one of those publishing companies a company with which #m had entered into an agreement for performance rights licenses?

A Some of those companies were, yes.

I would like to show you 3M PX 72 and ask you if you can identify that letter.

THE COURT: Are we ready?

Arrow-direct

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Q Subsequent to the receipt of this letter, did you have a telephone converation with Mr. Eastman during which you discussed the subject matter of this letter?

THE COURT: Are you talking about 72?

MR. BAKER: Yes.

THE COURT: Did you receive it from him?

THE WITNESS: Yes, we did receive it.

A And subsequent to the receipt of the letter I did have a conversation or more than one with Mr. Eastman.

Q Can you relate to me the subject matter of that conversation?

MR. TOPKIS: I object, your Honor.

THE COURT: We are getting very far afield.

I would like to terminate the examination at this time and among other things, discuss with everybody where we stand on this method of putting evidence in.

I will see counsel in the robing room.

(adjourned to May 14, 1973, 10:00 a.m.)

ONE CHASE MANHATTAN PLAZA

NEW YORK, NY 10005

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December 27, 1973

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WARD R BROSS, JR

IRY P RIORDAN

IN R HUPPER

WUEL C BUTLER

LIAM J SCHRENK, JR

DAVID BOOK WOOD

PAUL M DOO K

DAVID BOOK WOOD

PAUL M DOO K

Southern District Court Reporters, United States Courthouse, Foley Square, New York 10007

CBS v. ASCAP, et al.

Dear Sirs:

Herewith is a list of corrections to the trial transcript in the above matter for May 14, 15, 16 and 17. These corrections have been agreed upon among all counsel. Further corrections will follow.

Please prepare an addenda sheet embodying these corrections and deliver copies of the same to the undersigned attorneys. Many thanks for your cooperation.

Date	Page	Line(s)	Error	Change to
May 14	1275	20	tomorrow but	tomorrow, but
	1275	25	remain	remind
	1276	22	These	There
	1277	19	assering	asserting
	1278	5	blasbandreferred	Blasband referred
	1278	6	hat	that
	1278	21	T HE COURT:	THE COURT:
	1280	10	advise	advice
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Date	Page	Line(s)	Error	Change to
May 14	1280	19	incite	insight
	1283	25	Ohrenstein	Orenstein
	1286	9	youmean	you mean
	1287	9	any existing	any
	1287	10	degree, to any	degree, any
	1288	2	markers	marketers
	1288	22	or how do	or do
	1289	2	only the	only to the
	1290	3-4	contentionthat	contention that
	1290	19	identified truly	identified as truly
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	1296	7	srue	sure
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	1297	6	specic	specific
	1298	5	SCAP	ASCAP
	1298	24	thatASCAP	that ASCAP
	1301	12	entered	enter
	1304	14	refr esh	refresh
	1309	5 8	SCAP	ASCAP
	130	6 8	up a program	a per program

Date May 14	Page 1306	Line(s) 17-18	Error to it if not why not.	Change to to "if not why not."
	1306	22	Topkis	Topkis'
	1306	24	defendant	defendants
	1311	15	our	your
	1311	15	of meeting	of a meeting
	1314	23	RIFKIND	SONDAK
	1320	2	posit	possibility
	1320	8	time	times
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	1332	20	yourepeat	you repeat
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	133	7 20	specificallythat	specifically that
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	134	0 3	recal	recall
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	134	47 3	Chappel	Chappell

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Date	Page	Line(s)	Error	Change to	
May 14	1350	8	Dutchess	Duchess	
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Date	Page	Line(s)	Error	Change to
May 14	1401	3	perforamence	performance
	1403	14	inconnection	in connection
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	1407	4	P regman	Bregman
	1408	4	indicates	indicated
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	1413	12	Kraselowski	Krasilovski
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ITED STATES DISTRICT COURT WTHERN DISTRICT OF NEW YORK 1446

:Before:

LUMBIA BROADCASTING SYSTEM :HON. MORRIS E. LASKER,

: District Judge

48.

ERICAN SOCIETY OF COMPOSERS, : THORS & PUBLISHERS, ET AL., 1 69 CIVIL 5740

DEFENDANTS.

New York, May 15, 1973

STENOGRAPHER'S MINUTES

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Orlumbia Broadcasting System

vs.

69 Civ. 5740

Ar erican Society of Composers, Authors and Publishers et al.

> New York, New York. May 15, 1973 - 10:15 A.M.

(Trial resumed.)

ALLEN ARRIV resumed,

MR. HRUSKA: Your Honor, before we proceed with ing withous, Mr. Blasband is here again on another subpoena.

THE COURT: Another errand of mercy?

HR. HRUSKA: Yes.

HR. BLASBAID: Good morning, your Lonor.

MR. HRUSKA: Perhame I should explain the background of this. We did serve them yesterday with a subpoena
for another document, again looking forth to the testimony
of Mr. Kallman this afternoon. This document is Mr.
Reflman's notes of the meeting with Mr. Arrow and Mr.
Firkelstein and representatives of the AGAC.

The purpose of the subpoena was that the triginal document we had received from AGAC pursuant to the proof document, had several portions of it excised.

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I gather that Hr. Blasband's position is that trose portions were privileged, and so this represents another privilege question.

to make one request of CBS counsel. AGAC is not a monied organization. They operate at a deficit just about every year; and they are not going to be able to pay my fees and the fees of our firm for constantly coming down here.

Could we, if we have any more subpocras, get them all together:

MR. HRUSKA: Yes, let me say, your Honor,
that is, I think, a well-taken criticism, and I must apologize

MR. BLASBAND: It is just a request.

MR. HPUSKA: -- to Mr. Blasband for giving them these two subpoenss. I think it was probably just a -- THE CLURT: Well, everybody agrees that is a

reasonable request so I will see to it that --

MR .BLASBAND: Thank you, your Honor. Your Honor, the document in question, Hr. Hruska is quite correct, I had supplied CBS with a copy of the memorandum in question.

THE COURT: You have?

MR. BLASBAND: Yes, with certain deletions.
THE COURT: With the deletions.

MR. BLASBAND: And I have for your Honor the

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origina of the memorandum without deletions, and for your Honor's convenience, a copy showing which materials have not been deleted, the ones in brackets have not been deleted.

THE COURT: Right.

MR. BLASBAND: And the ground for the deletions is that those portions deleted refer to advice that the attorney is giving the client.

THE COURT: Right, I understand.

MR. BLASBAND: With your Honor's permission may I leave them with you?

THE COURT: You may.

MR. BLASHAND: Thank you, sir.

THE COURT: Mr. Hruska, what about your economist?

Is everything in order?

MR. HRUSKA: Yes, your Honor, he will be on tomorrow morning.

MR. TOPKIS: I am sorry, I didn't hear that.

MR. HRUSKA: Tomorrow morning.

MR. TOPKIS: Fisher?

MR. HRUSKA: Yes.

THE COURT: All right, you may proceed, Mr. Baker.

MR. BAKER: Thank you, your Honor.

DIRECT EXAMINATION (continued)
BY MR. BAKER:

Q Mr. Arrow, I believe we left off yesterday discussing your communications with Mr. Eastman after you had received the November 15, 1965 letter from AGAC, and I would like to begin again on that subject.

Do you recall the substance of your communications with Mr. Eastman to the extent they may have related to a misunderstanding concerning the reasons that 3M and ASCAP were unable to reach agreement?

A Well, I told Mr. Eastman that I had never advised him prior to that time that ASCAP had refused to negotiate with 3M. I had told him that ASCAP and 3M had negotiated and were unable to come to an agreement.

Mr. Eastman then questioned me further about the AGAC letter and asked me what I thought about it and asked me whether all of the statements contained in the letter were true.

I believe I told him that I thought that the letter unfairly characterized PM's position in the matter, and that I thought that the uses which were made by 3M at least under the Eastman contract and under the others which I had locked into did not constitute a block or

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bulk license.

Q Yes. You told us that you expressed to Mr. Eastman the view that you had previously told him that 3M and ASCAP were unable to agree.

Do you recall theview expressed by Mr. Eastman to you concerning the previous understanding of what you had told him?

MR. TOPKIS: If your lionor please --

MR. BAKER: Try to get at the nature of it.

THE COURT: Why wouldn't that be hearsay?

MR. BAKER: I think, your Monor, that the discussion will illustrate that Mr. Eastman had been under the impression that ASCAP had refused to negotiate with 3M.

THE COURT: Then call Mr. Eastman for that purpose.

MR. BAKER: That he the called Mr. Arrow, expressed his unhappiness at having been, he believed, misled, and Mr. Arrow apparently discussed with him their conversations that it was simp? a matter of inability. Mr. Eastman is a person who made a deal with 3M and I think that this exchange demonstrates at least Mr. Eastman's attitude toward direct licensing, namely, that the inability -- or at least the refusal of ASCAP was a factor in encouraging him to deal.

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THE COURT: But you are trying to prove what he thought and he is not here. I don't see how you can prove what he thought through Mr. Arrow.

MR. BAKER: I am simply trying to establish his state of mind through the communications which he uttered in or about that time.

THE COURT: I think CBS is vastly underestimating what it is trying to accomplish by this line. Of course, I know it is open for discussion and it is only fair to give you my views.

You say you are simply trying to give me his state of mind, but you are trying to prove to some extent that there was a basis for his having this state of mind.

Now I would be very interested to know what Mr. Eastman's state of mind was but I think the best proof of what his state of mind was is Mr. Eastman's statement.

I am willing to take a report of what he said as evidence of the factor or prompting factor which caused Mr. Arrow to reply as he did; but I can't regard it as proven by Mr. Arrow's testimony that Mr. Eastman believed that ASCAP refused to deal.

I can only take it as proven that he said so.

MR. BAKER: I didn't offer it, sir, for the

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proposition that ASCAP had refused to deal, but rather that he had been operating under a misapprehension.

THE COURT: No, I can't even take it that he was operating under a misapprehension, only that he said so.

For all I know it was a ruse on his part.

If you are trying to prove to me that he really thought so, you have to call him.

- Q Subsequent to receipt of the AGAC letter did you attend a meeting with AGAC?
 - A Yes.
 - Q Do you recall the date of that meeting?
- A I don't recall it precisely. I am sure it would be indicated in my diary.
 - Q Would you check April 21, 1966?

MR. RHUSKA: Your Honor, before we continue with this question, may I say one more word on the subject of Mr. Eastman and the general topic because I would like Mr. Baker to go back to the Eastman subject.

We do believe, your lover, that if we can establish through Mr. Arrow, who was an eye witness, in effect, a verbal -- an ear witness to many comments made by a number of publishers concerning the statements that those publishers made as refusals to deal or their reasons

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for refusals to deal, that that will establish a pattern which is probative of a state of mind with respect to those given circumstances, that is, the 3M attempt to license their compositions lirectly and bypass ASCAP.

and I don't say I will, the idea that the actual state of mind of these people and their actual positions on these subjects may be probative of something here. I am only saying that I don't think that Mr. Arrow can testify about what their actual state of mind was.

MR. HRUSKA: I don't think there is any question about that, your Honor. That is why I would like for just one moment to focus on this distinction which I see, too.

Obviously Mr. Arrow cannot crawl into Mr.

Eastman's rind or anybody else's mind. Nobody can do
that.

And if the entire subject of this lawsuit concerned Mr. Eastman's mind, it would be difficult to rest entirely on Mr. Arrow's testimony regarding what Mr. Eastman said. That is one side.

On the other side, and here is where I see the distinction, if Mr. Arrow or any eye witness can say,

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facts, and the publishers said A, B, C, D, E and so forth and so on," and those statements establish a pattern, then I believe that that testimony is probative of a group state of mind, the group consisting of the people with whom Mr. Arrow talked.

neir reactions were all consistent, or by and large consistent, that I think is extremely probative, and that is really what we are trying to bring out through Mr.

Arrow; and that is why we are asking him why Mr. -- or what Mr. Eastman said and what his reasons were, stated reasons, what he stated his reasons were for saying it.

Mr. Eastman may be a bad example.

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THE COURT: No, I don't think he is any different example from anybody else and I must say that I haven't understood as clearly as I now do what you just said.

I have understood you and I think you have emphasized, you or Mr. Baker as the case may be, your desire not to prove the truth of the state of mind through Mr. Arrow but merely that something was said, but I don't think you have made it clear before. Certainly, you haven't made it clear to me that you are attempting to establish a pattern and not just an individual act.

That may be a different situation.

MR. HRUSKA: May I just add one more thing to round out my position on this, your Honor?

What we are trying to establish is one of the most difficult things in a trial to establish, and that is how a given group of people would react under circumstances which have never occurred.

THE COURT: We have been through this before and I understand that.

MR. HRUSKA: All right.

THE COURT: But that does not mean that I can admit material which is inadmissible, just because it is difficult to prove.

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MR. HRUSKA: Of coarse.

THE COURT: Nor doss it mean there would be any sense in doing so because in the last analysis I have to be persuaded that you have proven it whether it is hard to prove or it is easy to prove.

MR. HRUSKA: The only reason I mention the difficulty of the proof is because this is proof that the members of the class, of course, would have a very strong incentive not to give, and it would be very easy for them not to give it, and we were fortunate in the depositions to get a good deal of this, and of course M. . Arrow is a disinterested witness. He is not a member of the class, he is not a defendant.

Yes, he represents publishers who are, but in comparison to the members of the class or the actual defendants, there is a world of difference.

THE COURT: All right. Mr. Topkis?

MR. TOPKIS: If your Honor please, my first observation is that the pattern is no where near being established and would not be but we will leave that for subsequent proof.

THE COURT: Yes, that is not relevant at the moment.

MR. TOPKIS: Right. I could keep talking about

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of such testimony but I understand at least now the rationale as to why it might be proative to parmit these references to be made, and I will permit Mr. Arrow to testify about what Mr. So-and-So told him, in this case Mr. Eastman, but with the understanding it is for the sole purpose of attempting, if the Plaintiffs can profit, to show that there was a pattern of conduct, conscious parallelism, whatever you want to call it, that is, of the special type of circumstantial evidence regarding intention which may be relevant in an antitrust case.

I agree with Mr. Topkis, as I have made clear previously, that the weight of this evidence in my mind is -- well, I don't know what adjective or adverb to use but anyway, certainly substantially less than the weight of that evidence would be if it came from the mouth of the person to whose actions it refers.

for the purpose of relating to any pattern, I will accept it, and I understand, Mr. Topkis, also, that even if all six or eight of the people about whom Mr. Arrow is questioned behaved in the same way, that you are free to argue that six out of eight is not much of a sample when there are a number in the hundreds of publishers.

MR. TOPKIS: Can I in 15 seconds note one other

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pattern of conduct and that is what the usual pattern is; but a pattern of mental set, I have never seen sought to be proved in this fashion.

The brides in the bath case I think was the classical example of the pattern of conduct demonstrating common plan or design or what have you; but here to attempt to psychoanalyze an entire group on the basis of a sample of a handful, on the basis of hearsay testimony, seems to me to be just so terribly risky when the ready alternative is available, namely, calling these people, reading the depositions of the people whose depositions have been taken, or using whatever other techniques may occur to counsel.

This technique, it seems to me, so so unreliable that it ought to be rejected by your Honor.

want to sound unsettled in my mind on this, I am not unsettled -- my general philosophy is that in a non-jury case involving fundamental economic questions of this kind, it is better to allow the testimony to be uttered and for me to consider, as I believe I can, whether it is relevant and probative, when the time comes, than it is to prevent it from being uttered and lose something we may need.

I am quite skeptical about the probative effect

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objection, your Honor, and it is this:

conduct by some people back in 1964, different people, their state of mind, is very slightly probative at best of what different people alive today by contrast with those in 1964, who are mostly dead, might do.

THE COURT: That goes to the weight of the evidence.

MR. TOPKIS: Yes, I agree.

THE COURT: It is a strong argument as to that.

All right. Mr. Baker, the storm has subsided and the sun is shining.

BY MIR. BAKER:

Mr. Arrow, I believe that before the storm came up, you said that you explained to Mr. Eastman the reasons which 3M and ASCAP had not dealt with an inability to deal and not a refusal on ASCAP's part and I would ask you now whether there had been a misunderstanding between you and Mr. Eastman concerning that subject.

A I don't know whether Mr. Eastman misunderstood me or not.

THE COURT: You mean we got ourselves all exercised for that kind of an answer?

Q I would like to show you three documents which

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relate to those communications, and ask you whether these documents refresh your recollection in any way:

3M PR 72, PK 715, and PK 716.

Before you look at those, could I ask you whether

Mr. Bastman represented the view to you after the November

15th letter that you had previously told him that ASCAP

had refused to deal with 3M?

- A Yes, he did.
- Q And was that inconsistent with your view of what you had represented to Mr. Eastman?
 - A Yes, it was.
- Q Did he indicate to you why it made a difference to him whether ASCAP had refused to deal?
 - A I don't believe so.

 What was your question?
- Q The question was does this refresh your recollection concerning whether Mr. Eastman expressed to you any reasons as to why it was important to him whether ASCAP had refused to deal with 3M or whether it was a matter of simple inability to reach agreement?
- A No, I don't think these letters add anything to the recollection on the subject.

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Is 3M PX 72 a letter which you received from Mr. Bastman?

A Yes.

MR. BAKER: I would like to offer it in evidence at this time, your Honor, for 1the purpose of demonstrating that Mr. Eastman said to Mr. Arrow what is set forth in that letter.

THE COURT: I take it the implication is inconsistent with what Mr. Arrow has just said?

MR. BAKER: I believe, sir, that the second sentence in the second paragraph does indicate the reasons that -- the question of whether ASCAP had refused or whether it was a simple inability to reach agreement; it does hear on that subject, yes, sir.

THE COURT: All right.

On the same narrow grounds as discussed at length before, I'll receive it.

(3M PX 72 received in evidence.)

THE COURT: I want to be sure I understand your position, Mr. Baker.

The question you asked Mr. Arrow was whether Mr. Eastman ever told Mr. Arrow why it made a difference to him to know that ASCAP had not refused to negotiate.

I must say I don't think this letter indicates

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that. It only indicates that he considered it important.

MR. BAKER: Well, fine.

THE COURT: Well, I think that is different.

MR. BAKER: But it is a significant factor in his mind.

THE COURT: But I don't think that is the question you put to Mr. Arrow.

All right.

Q Mr. Arrow, did you attend a meeting at AGAC on April 21, 1966?

A Yes.

- Q Do you recall how that meeting was arranged?
- A Yes.
- Q Would you describe that for us?

 THE COURT: When did the meeting occur?

 MR. BAKER: April 21, 1966.

A Some time before April 21, several things had happened in connection with this correspondence from AGAC.

I had a telephone conversation with Mr. Kellman concerning the correspondence and at some time perhaps a month before April 21 or even longer than that, I had by chance met Miss Stern on the street and either she suggested to me or I suggested to her that it would be in order for a meeting to take place with the interested

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MR. TOPKIS: No.

MR. BAKER: I am simply going to ask him to

people at AGAC, in order to exchange views concerning the actual facts of the matter and whether AGAC should have written this kind of letter at all.

In other words, a meeting to discuss what had actually happened and whether AGAC was acting correctly or not.

Subsequently, Miss Stern offered to arrange the meeting and she did so.

Q Prior to this meeting, would you describe the status of 3M's negotiations with ASCAP concerning the acquisition of performance rights licenses for the M700 series as active or lethargic or non-existent?

A They were non-existent.

Q And I would like to hand you 3M PX 75 and ask you if you can identify this document as being a letter from you to Mr. Lindgren, dated April 22, 1966.

MR. TOPKIS: Before that document is shown to the witness, it is stipulated that this letter is such a letter. The witness need not trouble himself to read it. THE COURT: All right.

Mr. Arrow, directing your attention to the second line of the first paragraph --

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identify Mr. Eliscu.

MR. TOPKIS: Then ask him that.

THE WITNESS: Excuse me.

Am I instructed not to read this letter or --

THE COURT: I haven't give you any instructions.

I don't see, Mr. Baker, if you want to find out who Mr. Eliscu is, why you can't ask.

Q Can you tell us who Mr. Eliscu is?

A He is a composer who was at the time of this

meeting either a member of the board of AGAC or a represent
ative who attended the April 21st meeting.

Q For what purpose was this letter written?

A I don't know what letter it is. I haven't looked ac it.

Q Would you look at it and tell us?
THE COURT: Look at it.

MR. TOPKIS: If your Homor pleases, this letter is a report on the meeting. If counsel wants the meeting to be described by the witness, I would think the ordinary way would be to ask the witness what--

THE COURT: I think Mr. Baker is entitled to at least ask the questions before I overrule them. Maybe the answers are incorrect but let's see what happens.

MR. BAKER: Really what I propose to do is offer

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the	letter in evidence as a report of what transpired at
the	meeting, your Honor, and simply ask the witness a
coup	ple of questions by way of elaboration on events at
that	t meeting.

I would like to offer it in evidence at this time.

THE COURT: What document is it? Can I have a little identification of it?

It is stipulated that it is what?

MR. BAKER: It is stipulated that it is a letter from Mr. Arrow to Mr. Lindgren of the date indicated. That is the extent of the stipulation.

THE COURT: All right.

Does this letter fairly describe the substance of what occurred at the meeting, Mr. Arrow?

THE WITNESS: Yes.

MISS KEARSE: Your Honor, I object.

This is a prior statement of the witness. The witness has not said he does not recall what happened at the meeting.

THE COURT: I don't see why a man can't make a report that can be put in evidence, just because he made it ahead of time.

MR. BAKER: Indeed, he made it the day after the

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meeting.

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THE COURT: He is here to be cross-examined

with regard to it.

I overrule the objection.

I'll receive it in evidence.

(3M PX 75 received in evidence.)

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Q Mr. Arrow, it is stated in this memorandum that in Herman's presentation of ASCAP's position, there 3 1 were a number of inaccuracies I don't believe it is

indicated what those inaccuracies were.

Do you recall at this time?

THE COURT: Herman being Mr. Finkelstein, I suppose,

MR. BAKER: Yes, sir.

A I believe at the time that I wrote this memorandum that Kerman Finkelstein didnot fairlycharacterize either 3M's market position or its ability to accumulate sufficient repertoire to continue its program and I believe also that during the meeting he at one time characterized our failure to agree with ASCAP as a problem of rate; that is, in terms of dollars, and I had never thought that that was the reason for our failure to agree.

Q You also state in this memorandum, "I told him," this is at the top of Page 3, the first sull sentence --"-- that in any event, the concept of blanket licenses was now incompatible with the existing situation and that u nless he could think of a way to combine the two ideas, we had to limit the discussion to per cartridge agreements."

Can you elaborate on the sense in which the

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present situation was incompatible with the blanket license? THE COURT: That being the then present situa-

MR. BAKER: The then present situation, yes,

sir.

tion?

A Yes. By this time, 3M had already sold a substantial number of machines and cartriages and 3M had guaranteed either verbally or in writing to its purchasers that they could continue to use the cartridges which they had purchased for a particular period of time without paying additional fees.

3M had also in a great number of instances represented to these purchasers that they could buy additional cartridges for approximately the same price, without having the requirement to pay additional performance rights to ASCAP, BILL or SESAC.

Mr. Finkelstein's suggestion that a blanket license be issued by ASCAP to cover the existing purchasers of equipment and music was obviously unworkable because it would include a provision to pay additional fees to ASCAP per year so that each purchaser would be required to pay at least some money to ASCAP for the use of the music the purchaser already had or for the use of the music it would -- the publisher would subsequently buy.

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of purchasers or the purchasers would and that was totally unworkable from our point of view.

THE COURT: Was Mr. Finkelstein's proposal a blanket license for 3M or a blanket license for the purchasers?

THE WITNESS: Either. We didn't regard the difference as significant. Either 3M was going to acquire a license and pass it on to the purchasers or ASCAP was going to pass it on automatically.

Q The next sentence states that "Herman then discussed the policing problems of the per cartridge program and said that in dealing with radio and television stations their rates for a per program license are four times higher than in the case of overall licenses."

Do you recall any additional statements by Mr.

Finkelstein which would relate his reference to the per

program rates for radio and television to the subject matter

which you were discussing?

A No.

On reflection, I think it was Mr. Finkelstein's position either at that meeting or at a subsequent meeting that if a per program license was requested of ASCAP or

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ASCAP members, the members themselves were in the best position to grant it.

THE COURT: Per program or por woo?

THE WITNESS: Per program or per wae.

THE COURT: Well, there is a annihilation in the letter to that effect.

THE WITNESS: Yes.

THE COURT: That is, that they will license only certain compositions.

THE WITNESS: Yes, sir.

O Directing your attention to the sentence beginning in the tenth line from the bottom of Page 3, you state that, "Herman then amazed us all when he said he thought the letter ill-advised because it was too mild amd should have been followed by a lawsuit."

Did Mr. Finkelstein at this meeting elaborate on the nature of that lawswit, what kind of action it should have been?

- A No.
- Q Did you respond to Mr. Pinkelstelm's comment?

 THE COURT: Were they addressed to you in par
 ticular?

THE WITNESS: Sorry?

THE COURT: Were they addressed to you in particular?

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referred to first was addressed to two or three of the people at the meeting after the meeting was ower. We were kind of milling around, looking for the exit and Mr. Pinkelstein then made that remark but I think I was there when it was made and two or three other people who had attended the meeting.

THE COURT: Mr. Baker asked you if you responded to it.

THE WITNESS: Yes, I did.

- Q Would you tell us what your response was?
- A I told him that I thought that that was a remark which he might want to repeat to the publisher members of ASCAP.
 - Q Did Mr. Finkelstein respond to your statement?
- A He said that in his view AGAC should have provoked some kind of litigation or lambuit out of the situation which was described in the letter.
- O Do you recall discussing at this meeting, and you can place 3M PX75 on the railing, because there is nothing in it regarding this, any discussion of the market position of 3M at that time?
 - A You mean in terms of sales?

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Q In terms of sales.

specifically, the number of machines pering sold each month, the number of machines you expected to sell that year, and the amounts of money distributed.

- A I think we did discuss that, yes.
- Q Do you recall what those figures were?
- A No, I don't.
- Q Did you in the course of that meeting indicate to Mr. Pinkelstein that 3M would like to license on a per song basis?

A I think we discussed licensing on a per cartridge basis.

End 2B 14

Q You have no recollection of licensing on a per song basis?

No, Mr. Baker, but the two from 3M's point of view would be almost interchangeable because the reportaires were locked in at that time, and there were only a certain number of songs which could be contained on any one cartridge; so I suppose if you want to assume that there were 500 compositions on a cartridge which belonged to ASCAP and 200 to everybody else, if you want to take a per cartridge fee to ASCAP and divided by 500, you might come up with a per song license.

O Do you recall Mr. Finkelstein's response to your per cartridge per piece request or suggestion?

A He didn't think it was workable from ASCAP's

point of view but he indicated towards the end of the meeting

that he was ready to explore it with us.

Q I would like to hand you a memorandum for the purpose of refreshing your recollection as to the statements you may have made -- this is PX127 -- for the purpose of refreshing your recollection with respect to the statements you may have made concerning the market position of 3M.

In that regard I would like to direct your attention to the third page and the fifth paragraph from the bottom.

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A I am sorry, what was your question?

The question is, does this refresh your recollection concerning the exact figures which you expressed at that meeting concerning 3M's market position?

A No. it doesn't, but the statement is consistent with my memory of what was happening at that time in the market. I don't recall expressing these numbers to the meeting.

What was your recollection of the status of 3M's market position at that time?

MR. TOPKIS: What was his recollection at that time? I am sorry, I don't get that.

MR. BAKER: What was his recollection of the status of 3M's market position at that time?

MISS KEARSE: Your Honor, I object. If that was not stated, I don't see the relevance, what it was.

THE COURT: Ame you going to be able to establish that it was discussed at the meeting?

MR. BAKER: No, your Honor, I think that actually what this is is an opportunity to simply put in another small piece of evidence on general conditions in the market such as the question I asked him on the first day as to how many machines were sold; to give some --

THE COURT: In other words, the question is what

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were 3M's sales at this period of time?

MR. BAKER: Yes, at what rate were they selling per months, approximately how much were they paying out, and --

THE COURT: Let's get one thing at a time.

A At that time 3M was selling machines at the rate of approximately 1500 per month, and cartridges at about 2000 per month.

Q Do you recall approximately how much you were distributing in -- well, that is computable.

A If you can do the arithmetic.

Q Yes, sir. Now when the meeting adjourned what was the status of negotiations between 3M and ASCAP concerning licensing of the M700 cartridge?

MR. TOPKIS: Haven't we had that all meady? We had the status just before the meeting and we had what happened at the meeting.

MR. BAKER: I would like to know if the meeting had any effect on it.

A The meeting resulted in an agreement between

Rerman Finkelstein and me to meet as soon as I returned from a trip.

Q Did one of those meetings occur on June 21, 1967?

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	I take it,	tr. Arrow, that efter the meeting from which you
	returned fr	rom your trip there were other meetings, is that
1	correct, or	a the subject of the M700 contridge?
	l . A	Other meetings with whom?
,	Q	ASCAP.
		After I returned from my trip we did have meeting
	yes.	
,	Q	Was one of those meetings held on June 21,
	1967?	
,	A	167?
2	Q	I am sorry. It is June 21, 1967.
3	A	Yes, I believe so.
•		THE COURT: Suly what?
	•	THE WITNESS: June 21 of 1967.
•		THE COURT: June 21, all wight.
,	Q	I would like to show you 3M PM85 and ask you
•	whether th	at describes the meeting that was held on that day
•		Yes.
0		MR. BAKER: I would like to offer it in evidence
1	at this ti	me, your Ronor.
2		THE COURT: On the same basis as my prior ruling,
2	received.	

Miss Kearse?

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MISS KEARSE: Same objection I stated, your

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June 21.

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Monor, with respect to 3M PX 75, but in addition the date of this document, 3M PX85 is July 6, 1967, as it is typed on here, and there are several other dates which appear in various forms, and it doesn't even appear to be a contemporaneous report.

THE COURT: Then you want to ask questions about that, Mr. Baker, so we can see if it is?

Mr. Arrow, can you describe the circumstances under which this document was prepared in terms of its --

THE COURT: Did you prepare it?

THE WITHESS: Yes, I did.

THE COURT: What is it?

THE WITHESS: It is a letter to Mr. Lindgren.

THE COURT: Reporting what happened?

that we had in St. Paul with Mr. Korman and Mr. Lindgren and Mr. Schmidt of 3M.

THE COURT: I thought you were asked whether this reflected what occurred on June 21, is that correct?

THE WITHESS: It did reflect what occurred on

THE COURT: Who was at that meeting?

THE WITNESS: That was that meeting; the meeting tool place in St. Paul on June 21.

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THE CCURF: I see. All right.

THE WITHESS: But the letter is dated July 5.

THE COURT: When did you prepare the material that went into that letter? Did you draft it on the 6th of July, as far as you know?

THE WITNESS: I probably prepared it from not es which I took at the meeting and most likely prepared it during the weak following the meeting. I can't account for the delay in sending it to St. Paul.

> THE COURT: Have you looked it over now? THE WITNESS: Yes.

THE COURT: And you believe it accurately reflects what occurred at that meeting?

THE WITNESS: Yes, I do.

THE COURT: I will receive it.

(Exhibit 3M PX85 was received in evidence.)

Only one question with regard to this document, Mr.Arrow. At the top of Page 2, Paragraph no. 5, let me just ask you if you recall whether the ratio of tapes, cartridges sold to machines at or about that time.

A Yes, I do.

What was that ratio?

It was approximately 1.4 per customer.

Mr. Arrow, was there another meeting between Q

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representatives of 3M and representatives of ASCAP on January 16, 19687

A '68?

Q '68, yes, mir.

A Yes.

Q I would like to now hand the witness 3H PX86, and ask him if he prepared this document.

A Yes, I did.

Q Does this document fairly reflect the events of the meeting of January 16, 1968?

A Yes.

MR. BAKER: I would like to offer it in evidence at this time, your Honor.

THE COURT: Same objection.

MISS KEARSE: Same objection as to 3M PX75.

THE COUR T: Same ruling.

(Exhibit 3M PK 86 was received in evidence.)

THE COURS: Is this again a better from you to

Mr. Lindgren?

THE WITNESS: This is a memorandum from me to

Q I would now like to hand the witness 3M PX94.

Let's hold up on that just a moment. Did there come a time,

Mr. Arrow, in your discussions with ASCAP where the focus of

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negotiations shifted from the M700 to the M1200 project?

A Yes.

Q And can you just briefly summarize how that came about and approximately when?

MR. TOPKIS: If I may, isn't that covered in the last exhibit where the report the witness has testified to concludes that it was agreed by everybody present that the new agreement would be applicable only to the new equipment by which was meant the 1200, and cartridges, and would continue to service the old equipment and old cartridges under 3M's existing agreements with publishers.

THE COURT: Well, I haven't seen the exhibit so

MR. TOPKIS: I am sorry, your Honor.

THE COURT: It seems to bear that out. Maybe Mr. Baker wants to illuminate that subject a little further.

MR. BAKER: Your Honor, that statement, I didn't recall it being there and I will simply go on to ask the witness if 3M PX94 represents the culmination of the negotiations through 1967 and '68 between 3M and ASCAP regarding the M1200 project.

THE COURT: First of all, will you ask him what

3M PX94 is? I don't know.

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MR. BAKER: Yes, sir.

It appears on its face to be a contract between ASCAP and 3M relating to the M1200 project.

A Yes, this is a contract between ASCAP and 3M and it does refer only to the 3M 1200, and it would empody the understanding which was eventually reached between ASCAP and 3M with respect to that project.

THE COURT: Is that a contract or a renewal of the .
still in existence --

THE WITNESS: I am sorry, sir?

THE COURT: Is that a renewal of the still in existence --

THE WITNESS: With modifications. I think I should say also that this does not embody the entire understanding. There is --

Q I would like the witness to look at 3M PX 95 and ask him if that is the remainder of the understanding to which he is referring.

A Yes, it is.

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MR. BAKER: I would now like to offer in evidence, your Honor, the following exhibits which I will briefly describe and unless there is some objection to them, I don't propose to bother Mr. Arrow with them.

3M PX 24, which is the 3M Consolidated Music Publishers Agreement on the M700, --

MR. TOPKIS: Excuse me. Before we leave 3M PX 95, is that being offered?

MR. BAKER: I'm sorry.

And 95 also.

THE COURT: All right, they are received.

(3M PX 94 and 95 received in evidence.)

THE COURT: All right, Mr. Baker.

which is the agreement between 3M and the Consolidated

Music Publishers concerning the M700; 3M PX 32, which

is a similar agreement with Jewel Music; 3M PX 50, which

is a similar agreement with Shapiro-Bernstein; 3M PX 54,

which is the agreement with Bourne; 3M PX 57, which is the

agreement with Joy; and 3M PX 59 and 61, which is the

agreement, and I believe a modification, with Criterion.

THE COURT: Any objection?

MR. TOPKIS: No objection.

MISS KEARSE: No objection.

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THE COURT: All right. Received.

(3M PX 24, 32, 50, 56, 57, 59, 61 received in evidence.)

MR. BAKER: I would also at this time like to offer a document which I believe the witness has previously identified, Plaintiff's Exhibit 689.

THE COURT: What is that?

MR. BAKER: That is a letter to the Music Publishers Holding Company setting out -- it is a letter from
Allen Arrow to Mr. George Lee of the Music Publishers
Holding Company setting out some of the terms which they
discussed in the course of negotiations, your Honor.

MR. TOPKIS: No objection to the fact that such letter was sent.

THE COURT: All right. Received as indicated.

(PX 689 received in evidence as indicated.)

Q Mr. Arrow, there is one matter in yesterday's testimony, page 1408 of the transcript, which I would like to direct your attention to. Line 13 through 15, and I ask you whether you recall whether your tesimony was performing rights associates or performing rights societies.

A Societies.

Q Mr. Arrow, yesterday I believe you testified that the marketing people at 3M had advised you that they

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expected to sell a minimum of 6000 cartridges a year; but that you did not have any other figure concerning projected sales.

I would like to direct your attention to 3M PX 42, page 4, the second paragraph.

THE COURT: This is referring to refreshing his recollection?

MR. BAKER: Yes, your Honor, basically the question is, this document is in evidence, and there is a statement in there that while they would be prepared to guarantee Frank Music 7,500 a year, that Mr. Arrow would expect total royalties payable to ASCAP -- payable to Frank Affiliates to equal \$15,000 a year, and I would like to ask him what the foundation for that expectation was; if he can recall at this time.

MISS KEARSE: If your Honor pleases, I believe this document has only been admitted for a limited purpose, not for the truth of the matter asserted.

THE COURT: Well, for purpose of questioning the witness it isn't necessary to have the document.

You did make such a statement in a letter, Mr. Arrow, at that time?

THE WITNESS: Yes, I did.

THE COURT: Do you remember what the basis of

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your making that statement was?

THE WITNESS: If I can just do the arithmetic for a moment, maybe I can--

I want to see if I can do it out loud. We were offering to include a minimum of 25 selections from the Frank repertoire, which would pay to Frank 5 cents per selection for \$1.25 per cartridge. We had estimated 5000 cartridges.

THE COURT: That would be \$7500.

THE WITNESS: That would be \$7500 which is what we were guaranteeing to Frank.

THE COURT: So you were guessing that there might be 12,000 cartridges sold apparently?

THE WITNESS: Correct.

gubsequently in this paragraph we talk about an estimate of 15,000 per year.

I think we probably estimated that based upon some increased sales formula, but the guarantee was still based upon 6000 per year.

Q The gist of my question is was there anything other than your judgment, was there some indication that you expected to sell 12,000 cartridges a year?

Just to follow the math out --

A The 6000 was a minimum sale figure, and I believe

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that all thro	ough 3M t	he expect	tation was	that	they won	ald
exceed that.	I have	no other	r basis for	hav:	ing chan	ged
the estimate	from the	minimum	guarantee	to a	maximum	e::-
pectation.						

Q One other question about Frank Music.

Did you have discussions with Frank Music Company back in late 1964 or late 1965 concerning a consultation agreement?

A Yes.

Q Did 3M offer Frank Music such a consultation agreement in connection with the licensing of the first series of the M700?

A Yes.

Q I would like to direct your attention to 3M

PX 44, which appears to be a draft of such an agreement,

and ask you whether this in substance sets forth the terms

of that offer?

A Yes, it does.

MR. BAKER: I would like to offer 3M PX 44 in evidence at this time.

MR. TOPKIS: Excuse me, the document I have has one page.

MR. BAKER: Same number of pages as the one I have.

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MR. TOPKIS: One page is the right number?
All right.

Do I understand that this was delivered to Prank?

THE COURT: I understood it was just a draft of something but I don't know if it was delivered or not.

Was it delivered, as far as you know, Mr. Arrow?
THE WITNESS: I don't recall.

MR. TOPKIS: Then I suggest if it was not, it is irrelevant.

MR. BAKER: I asked him whether it fairly reflected the substance of the terms offered to Frank Music in
the 3M consultation agreement and my recollection is his
answer was yes.

THE COURT: There is no doubt about that.

The question I suppose next would arise is whether this agreement was ever consummated. If that is relevant.

I take it you think it isn't relevant and the defendants probably think it is relevant.

Am I correct in characterizing everybody's position in the matter?

MR. TOPKIS: Well, I don't even know that this was ever offered to Frank in light of the witness' two answers.

THE COURT: Let's get it clarified.

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Was the substance of this proposal offered to Prank?

THE WITNESS: Yes.

THE COURT: And was an agreement ever consummated?

THE WITNESS: No; not according to these terms.

THE COURT: Well, I see; but an agreement was consummated that was not in accordance with these terms?

THE WITNESS: Yes.

THE COURT: What good will it do me to know about an offer that was made when a different agreement was reached?

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MR. BAKER: If I can ask the witness about two questions, I think I can clear it up.

O The agreement which was consummated between Frank Music and 3M relating to the M700 project related to a second series of tapes for the M700 cartridge, is that correct?

- A Yes, it did.
- Q And those negotiations were separate in time from the negotiations for the first series, is that correct?
 - That is correct.
- Q And was the offer of the consultation agreement made with respect to the negotiations for the first series?
 - Yas.
- Q. And was the offer of the consultation agreement together with the other aspects of the offer which were previously discussed accepted by Frank Music for the first series?
 - I'm sorry, are you asking me --A
- Did Frank Music and 3M enter into an agreement for the first series?
 - A No.

THE COURT: I gather not.

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SOLITHERN DISTRICT COURT REPORTERS UNITED STATES COURT HOUSE FOLLEY SQUAR N.Y., RLY 10007 SLEPHONE: CORTLAND 74580 What is this offered to establish?

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MR. BAKER: Simply the terms of the offer on the first series of tapes. That this was part of it which I left out yesterday, your Honor.

THE COURT: But what is the offer itself intended to establish?

MR. BAKER: The document?

THE COURT: No. What do you consider to be the significance of the fact that 3M made an offer to Frank?

MR.:BAKER: I think the terms of the offer, the fact that they offered to guarantee them \$7,500, 25 songs, is significant in terms of their reluctance to enter into the agreement and I think that added to that is the fact that they were offered a consultation agreement in connection with that for the amounts set forth in this consultation agreement.

THE COURT: For that purpose, I'll receive it.

MISS KEARSE: Your Honor, I want my objection

noted to receipt of this document which the witness does not

recall whether or not it was sent to Frank Music.

(3M PX 44 received in evidence.)

THE COURT: There is no doubt in your mind that whether that document was sent or not, No. 1, it fairly states the terms of the offer and, number two, the terms of

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the offer were communicated to Frank?

THE WITNESS: Yes, sir.

I suppose a witness should never be a volunteer but I believe there is some mischaracterization of the sum of the offers which were made to Frank with respect to the first series of cartridges.

THE COURT: Of the sum of the offers?

THE WITNESS: Yes.

THE COURG: You mean s-u-m?

THE WITNESS: I think what I am gathering from what I am being asked is whether -- is that there is an impression that this consultative fee and the \$7500 per year were cumulative. They were not.

THE COURT: The same as the other situation with Mr. Chiantia, to be applied against-

THE WITNESS: This was a little different.

This \$22,500 is 7500 times three which was a substitute for a guarantee which would have been payable under the ordinary agreement.

THE COURT: All right.

MR. BAKER: I think if I could have a few minutes to consult with my colleagues, I might be able to wrap this up with two or three more questions.

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THE COURT: Do you want to take the morning break?

MR. BAKER: Yes.

(Recess.)

Q Mr. Arrow, I would like to direct your attention to a passage in your testimony yesterday, at page 1350, beginning on line 17 --

THE COURT: Is this a correction you want or what?

MR. BAKER: No. I think a clarification, your

Honor.

to Mr. Chiantia the marketing objectives of 3M and I don't think it is clear from the record whether in the course of your conversations with Mr. Chiantia you advised him that it was 3M's expectations that the types of establishments for which the M700 project was intended were not basically the same types of establishments which were then serviced by Muzak and Seeburg.

A We did discuss the type of establishment which

3M was going to approach. I can't quite characterize the

conversation quite in the way you phrased the question.

In other words, there would be some overlap
with Muzak. We were not saying that we would not approach -the 3M salesman would not approach customers which might

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have been serviced by Muzak, but rather that the thrust of 3M's marketing program was directed to establishments which did not then have background music services.

Q Did you indicate to Mr. Chiantia the extent of overlap you expected?

A We thought there would be some overlap but a very small percentage.

Q We are talking in the range of 5, 10, 15?

A Oh, I don't think we put it in those terms. We thought there would be very little loss of business to Muzak and Seeburg coming into 3M's pocket.

Q Mr. Arrow, do you recall whether in the fall of 1965 3M scheduled a luncheon meeting between itself and publishers who had licensed 3M with respect to the M700 cartridge?

A Yes.

O Did any of the publishers invited to attend that meeting indicate to you that they did not want that meeting attended by the press?

MR. TOPKIS: I object, your Homor. What conceivable difference could that make?

THE COURT: I suppose this is part of the pattern that CBS is trying to establish.

MR. BAKER: Yes.

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THE COURT: I'll accept it for that but I can imagine many reasons why they might not have wanted the press there.

MR. TOPKIS: Can we at least know the identity of any publisher who was so shy?

THE COURT: If Mr. Arrow can remember.

Do you recall whether any such requests were made?

THE WITNESS. Yes, I do.

- Q Do you recall who made those requests?
- A I believe Mr. Brettler did.

I can't recall offhand who else did.

Q Do you recall the reasons which they expressed to you that they desired not to have the luncheon attended by the press?

MR. TOPKIS: I object to that, your Honor. That is classic hearsay and there is just nothing I can do with it.

THE COURT: This is the basic problem that I dealt with this morning and I have so many times expressed my views now that I don't think there is any need for me to express them time after time.

I have serious doubts about the admissibility or the probative value of the answer to this question but

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I am giving CBS its opportunity to argue that and 7'1' accept the question.

MISS REARSE: Can we have the question limited to what Mr. Brettler, who is the only publisher identified, said, rather than unidentified people?

THE COURT: I think it has to be limited to him, if you can remember what he said.

A I don't recall his precise words but the tenor of his remarks was that he preferred not to be identified again as a member of the group which had licensed 3M.

Q Did he tell you why he preferred not to be so identified?

A Again, I can't recall his precise words but at a number of times, Mr. Brettler indicated to me that he had been regarded as a bad boy or a bad actor in connection with this entire program.

I would like to show you EM PE 49 and ask you if you can identify this as a letter from Mr. Arrow, yourself, to Mr. Lindgren, and ask you whether this refreshes your recollection concerning any of the other publishers who may have spoken to you or what they said.

MR. TOPKIS: I think the identity is the first question and if no identity, then no saying.

THE COURT: Right.

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THE WITHESS: What was your question?

THE COURT: The question is, does that refresh
your recollection as to any of the other publishers who
were present who requested the press not be present.

A I recall specifically only Mr. Brettler.

don't want to hear even if your recollection is refreshed, as to what was said.

MR. HRUSKA: May I try to support a brief exception to that ruling, your Honor?

We are dealing here with a group of publishers which cannot be possibly larger than 12.

We have had one member of the group identified.

We know who the 12 publishers were. These are publishers

who dealt with 3M for the first series.

an attitude identified in this document as coming from several publishers is relevant even though the names of those publishers are not identified because any one of these 12 publishers having expressed that feeling would be a relevant fact because the group is so limited.

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relevant. We are raising the question of whether this is competent evidence of the fact that it occurred and I am not going to permit testimony about what somebody else said without that person being at least identified so that the defendants can call him and try to controvert the proposition, if they wish to do so.

MR. BAKER: I would also like to offer at this time 3M PXI which is an acknowledgement of music rights agreement which I believe is referred to in the various contracts relating to the M700 program.

- Q I will just ask Mr. Arrow if he can identify it.
- A Yes, I can.
- Q And would you tell us what it is and what it was used for?

A Yes. This is a document which was prepared for signature by purchasers of the machines and cartridges by which they acknowledged the extent of the rights and the limitations on the rights which were passed on to them by 3M in connection with the 700 program.

MR. BAKER: I would like to offer it in evidence at this time.

MR. TOPKIS: No objection, your Honor.

MISS KEARSE: I don't really see the relevance

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of it, your Honor.

offhand. I know that they had such an agreement and I suppose it can't hurt for me to have it.

What does it prove?

MR. BAKER: It is referred to in the contract, your Honor, and I simply wanted to have it in because I felt that we would be wanting to use it in our proposed findings of fact.

THE COURT: All right.

MISS KEARSE: I didn't understand the explanation as to the relevance.

MR. BAKER: It is part of the legal arrangements.

and for the sake of completion, I gather that CBS feels, since it has been referred to, it ought to be part of the record.

(Exhibit 3M PX1 was received in evidence.)

Q Mr. Arrow, before you started down the road of direct negotiations with publishers for the 11700 first series, had you had past dealings with the principals at most of the companies with whom you dealt eventually?

MR. TOPKIS: May I hear the question?

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THE COURT: He is asking, before the negotiations started on the M700, did Mr. Arrow know most of the people that he eventually negotiated with.

MR. TOPKIS: All right.

A Yes.

Q And was that through business dealings which you had with them previously, or legal?

A Either business dealings or social business or general meetings.

THE COURT: You were all in the trade together, is that it?

THE WITNESS: Yes, sir.

Q As I tick off the names of these publishers, would you indicate who at each publisher or the persons?

A Who?

THE COURT: What is the purpose of taking time for this?

MR. BAKER: I wanted to establish that Mr. Arrow had had previous dealings with these people, your Honor, and that that in some ways might have been of assistance to him in negotiating the 11700 agreement.

THE COURT: Well, I get lost sometimes as to what that would prove. If he did know them and it did help

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him, the : what?

MR. HRUSKA: Well, your Honor, we are trying to ritimately in this case we will be making the point to your Honor, and I understand that we are doing it piece by piece and it is difficult to bring it all together, but we will be making the point to your Honor that the circumstances surrounding the 3M matter would apply to a CBS bypass a fortiori for a number of reasons.

THE COURT: I know that.

MR. HRUSKA: One of the small reasons hvolved here but a reason is that the person who made this abroach on behalf of 3M, Mr. Arrow, is a person who has singula attributes for making such an approach; that he was personally acquainted and on good terms and had a very high reputation among the publishers whom Mr. Arrow approached.

That, we believe, was of great assistance in paving the way for this project and it is of some --

that he knew a lot of the people and obviously his entire testimony makes it perfectly clear that he was very thoroughly immersed in the industry and I don't think we need to know each single person he knew and for how long, but there is a serious question as to whether that would be a comparable status to CBS trying to get in touch with an individual

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composer.

It seems to me that CBS is also reasonably well known in the entertainment field.

MR. HRUSKA: Not in the same light, your Honor, as a man who has been representing music publishers all his life. All his professional life.

THE COURT: All right. So, let's skip the fine details of that point.

MR. BAKER: All right, your Honor.

Q Mr. Arrow, did it ever come to your attention that establishments which purchased the M700 cartridge were having difficulties with ASCAP field men?

MR. TOPKIS: What is that question? I object to its form. That is my first objection.

MR. HRUSKA: Then you must have heard it.

MISS KEARSE: And the second is --

form, although I am not sure Mr. Topkis heard the question because I think the word "difficulty" is a pretty slippery word.

If you want to say, did you ever get any reports back about contacts with ASCAP people, all right, and we will find out what the reports were.

Q Did you ever have any reports back about

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2	contacts	with ASCAP people.
3		MR. TOPKIS: From?
4		THE COURT: From 3M, isn't that right?
5		MR. BAKER: From 3M or the customers of 311.
6	. A	Yes.
7	Q	What was the nature of those reports?
8		MR. TOPKIS: Objection.
9		THE COURT: Overruled.
10		MR. TOPKIS: Hearsay.
11		THE COURT: I will allow it for the purpose of,
12	the sole	purpose, of determining whether any action was
13	taken on	the basis of it, but otherwise, it is certainly
14	hearsay.	
15		Let's put it this way as a result of those
16	reports,	did you take any action or did 311 take any action?
17		THE WITHESS: Yes.
18		THE COURT : What action 'id it take?
19		THE WITNESS: I think we had correspondence either
20	with the	sales personnel who had been contacted or we
21	wrote di	rectly to the proprietors of the places which were
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THE COURT: I don't think there is any need for you all to keep standing.

contacted.

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MR. BAKER: It is somewhat difficult to give any context to this, unless we know what the reports were, your Honor.

THE COURT: Well, are you asking him to report

about the reports for the purpose of proving the truth of the reports?

MR. BAKER: Only for the purpose of proving that he received them and then ask him -- he said that they then gotin contact with certain people and I would like to ask him what he said to them.

THE COURT: You can tell me what you said to them. You are you.

What did you say to them?

matters at this time. I can only characterize them at this moment generally. I think there was an instance where we --

THE COURT: Where it was reported to you, right?

THE WITNESS: Yes. An instance where it was reported to me that an ASCAP field representative had contended that either a hotel or a restaurant night club was performing 3M music without a license, and therefore would be liable.

MR. TOPKIS: Performing 3M music or ASCAP music?

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THE WITNESS: Music contained in the 3M cartridge, through the 3M machine.

A At that time, I believe through investigation, it turned out that the problem was that the proprietor was performing music other than just through the 3M machine and upon that investigation we advised him that the license he obtained through 3M did not cover those additional performances.

I think, from recollection, that there were other instances where 3M sales personnel reported that contacts had been made by the ASCAP field representative and in each instance, when we investigated the matter, it was eventually cleared up.

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- Do you recall the specifics of any of the other situations where this occurred?
 - A Not offhand, no.
- Q I would like to hand you PX791 and ask you if that refreshes your recollection in any way, as well as PX815.

THE COURT: I hope both Mr. Baker and Mr. Hruska understand that I cannot accept Mr. Arrow's testimony that report had been made to him as the truth of the fact.

MR. BAKER: The truth of the contents of the report.

THE COURT: Yes.

MR. BAKER: But you can as to the fact the report was made to him.

THE COURT: Yes, but what if a report was made to him, unless I know it was true? What good does it do for me to know that 3M heard that ASCAP was interfering unless ASCAP actually was interfering?

MR. HRUSKA: Your Honor, the interference is not really the point of this. What we are trying to establish here is that ASCAP representatives in the local offices of ASCAP, which generally do the policing of usages, did in fact go to establishments that had taken the 11700 machine.

THE COURT: How are you going to prove that?

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Mr. Arrow didn't see those people.

MR. HRUSKA: I realise that, your Honor, but if the 3M company took action as the result of those reports, and communicated with customers of 3M to verify the reports, and communicated with ASCAP about the contacts that ASCAP had made, and generally entered into correspondence with ASCAP about this matter, I think all those extrinsic facts concerning the matter will be a sufficient foundation for an inference which can be supported by other evidence in this case that ASCAP in fact did conduct policing of 3M customers.

Now, the significance of that, your Honor, is that ASCAP had taken the position at an early stage of the negotiations with 3M that it would not or would have a problem in policing those installations. Some of the publishers whom we have deposed on this 3M incident, took the position that one of their big problems was their concern about the lack of policing at the end of the first three-year term on these 3M machines.

It is our position that that statement, that justification for not dealing with 3% offered by some of these publisher deponents is not true, that this was not really a matter of concern, that there was no particular problem in ASCAP policing these installations.

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pressure and so forth, and this case has been building up for three years. I should think it would have been possible to find somebody who has some first-hand knowledge of this plicing problem; or to find, and I will allow testimony about reports to ASCAP or contacts Mr. Arrow had with ASCAP because I think there is some probative value if he reported something to ASCAP and ASCAP looked into it or acquiesced into believing that the charge was correct, maybe the charge was correct.

But I am only trying to point out the kind of backhanded quality of proof, and of course --

MR. HRUSKA: May I just comment on that point,
your Honor? I think that the real amount of pretrial
discovery we had in this case, despite the fact that it was
three years old, really comes down to a matter of several
months. We were just skimming the surface of a number of
these matters.

THE COURT: Let's not get into that whole situation. Perhaps I shouldn't have said anything.

MR. HRUSKA: 30,000 3H installations --

THE COURT: What I am really saying is it's not of much important. Whether it was possible to do one thing

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or not, I am still left without the kind of proof that I would like and perhaps you would like to have me have too.

Do you want to add anything, Mr. Topkis, or have I said enough to take care of your needs?

MR. TOPKIS: I can't answer anything, your
Honor, unless I have the detail. I have had one. The witness has testified about one where apparently ASCAP was
right. If he can testify about another, and with particulars
which we can respond to, all right, but I certainly don't
believe that his testimony ought to be admitted as proof
of ASCAP's policing or not policing. He doesn't know. All
he got was reports.

MR. HRUSKA: We can't find that out, your Honor, until we really get the question. Maybe the questions and answers could be given subject to a motion to strike. We are kind of frustrated at the outset.

THE COURT: All right, subject to a motion to strike. Miss Kearse?

MISS REARSE: Well, I think mr. Hruska's statement reveals fairly clearly that Mr. Arrow is being questioned about reports to show the truth of the reports, and I don't think we can get that from the witness.

THE COURT: You can't get it from this witness, and even Mr. Hruska doesn't say you can. He said this, plus

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Honor.

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MISS KEARSE: But this is concluded and that is improper.

a lot of other things may allow me to infer that.

MR. TOPKIS: And this plus a lot of other things all coming from the witness. There is an old doctrine of water can't rise above its source and this source is mighty, mighty low.

THE COURT: All right. With all that observation and philosophy, let's proceed subject to a motion to same.

Q Mr. Arrow, I would like to ask you whether you recall any other instances concernint contacts by ASCAP field men with establishments who purchased the M700 cartrige on the basis of your examination of PX791 and PX815.

Was your question does this refr esh my recollection with respect to any specific instances?

Yes, sir. Q

No, it doesn't.

Is PX815 a letter from you to Mr. Herman Finkelstein of ASCAP?

MR. TOPKIS: It is stipulated that it is, your

MR. BAKER: I would like to offer it in evidence

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at this time.

MR. TOPKIS: I object.

THE COURT: Is this dealing with the policing situation?

MR. BAKER: Dealing with the policing situation.

MR. TOPKIS: Dealing with what?

MR . BAKER: Dealing with the situation of contacts between representatives of ASCAP and purchasers of 3M equipment.

THE COURT: I will allow it in evidence for the purpose of establishing that Mr. Finkelstein was informed of the contents of the letter, hat is that the letter was sent to him.

MR. TOPKIS: Could I have called to your attention a point in this letter to which counsel has reference as coming within that description? It is dated March 4, 1971, I should perhaps call to your Honor's attention.

MR. BAKER: Page 3, the last full paragraph, the last partial paragraph.

THE COURT: Does this refer back to a period in history about which you were recently questioning?

MR. TOPKIS: No.

MR. BAKER: No, but I don't think it is really

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mbb-7 Arrow-direct nacessary that it does, your Honor, because my recollection 2 of the earlier testimony is that the policing problem 3 and the concern with 3M equipment in the field related 1 to the period after the expiration of the first three-year 5 6 license. THE COURT: I see. 7 8 MR. TOPKIS: Your Honor, here is the problem: 9 10 11

In March of 1971, for whatever reasons I don't know, apparently there was a meeting between Mr. Arrow and Mr. Finkelstein and Mr. Korman and Mr. Lindgren, at which some rather unkind sentiments were exchanged.

I see no reason why this record should be cluttered with Mr. Arrow's letter referring to that, which has nothing to do with this.

THE COURT: But he has zeroed in on a paragraph. I am af aid I will have to look at it to see if it is admissible or not.

What paragraph?

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MR. BAKER: Page 3, the first full paragraph from the bottom.

THE COURT: From the bottom.

MR. BAKER: Yes, sir.

MR. HRUSKA: "For the time being" the paragraph starting with that phrase. And --

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THE COURT: This is a letter from Mr. Arrow to Mr. Finkelstein.

MR. BAKER: The last partial paragraph on Page 3 and continuing on Page 4.

THE COURT: I don't understand why you don't ask Mr. Arrow, if he has been advised that there was harrassment of 3M people, and communicated that to Mr. Finkelstein. That would be --

absurd than that. This is harassment of people on whose behalf 3M is paying ASCAP license fees. Now, what could that possibly have to do with the issue we are supposed to be concerned with in this courtroom, namely, disinclination on the part of some ASCAP publishers.

MR. HRUSKA: I think Mr. Topkis has the facts wrong.

problem is raised for a different purpose. Even I was confused when I talked about harassment. That it to show that ASCAP can police. Is that right?

MR. HRUSKA: Can and did, can and did, actually did, and our point, your Honor, is that the amount of policing must have been sufficient in extent to justify this statement.

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to be able to treat seriously. I don't think -- I

don't mean the subject isn't serious or there isn't some

way it can be seriously treated, but for me to find something

such as you suggest on the basis of the fact that there

is a paragraph in a letter to that effect seems to me

to be wholly inadequate.

Now, if you are serious about this, let's find set from Mr. Arrew when he was told and what he told Mr. Finhelstein.

MR. ERUSEA: Pine.

THE COURT: And of course these would have to be a good deal more to it than that, but at least t hat is the way to handle it while this witness is here.

Q Mr. Arrow, was there a problem concerning harassment of licensees of 3M equipment by ASCAP field men?

THE COURT: Were you told that there was?

- Q Were you to 1 that there was?
- A Yes, I was told that there was.
- Q Did you discuss that with Mr. Finkelstein?
- and perhaps with Mr. Korman.

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Q And what did you say to them and what did they say to you?

A I believe that when I was told that there had been a report of an incident, where there was reason to believe that the ASCAP representative was wrong, I would communicate that either by telephone or by letter to Mr. Finkelstein or to Mr. Korman or Mr. Collins, and they would investigage and let me know what their version of the situation was.

I don't recall -- in fact, I am fairly certain that there never has been situation arising out of the sale of a 3M machine, or the use of the music on the cartridges, and to the best of my recollection, each situation was researched and dealt with eventually to 3M's satisfaction.

THE COURT: Can you give me some idea of the scope of these reports, how many such reports did you receive over what period of time, and how many were communicated to you?

I probably was advised of tem or twelve since the inception of the program.

THE COURT: Which program?

THE WITNESS: The 700 program. The machines were not placed on sale until August 1965.

THE COURT: Are you saying 12 reports since then?

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THE WITNESS: That I have been advised of.

THE COURT: That is all we are talking about, what you have been advised of.

Now when did you enter into a license agreement with ASCAP itself, 1968, was that?

THE WITNESS: 1968, Yes.

THE COURT: Have the bulk of these reports been before or since or are they fairly evenly distributed or do you remember?

THE WITNESS: I would - I think they were fairly evenly distributed; no specific pattern.

MR. TOPKIS: May I now move to strike this entire subject, your Honor? Otherwise we are going to find the word harassment showing up in post-trial findings.

THE COURT: Yes, I think that --

MR. HRUSKA: I can assure the Court that the purpose of this is not for the word harassment. We are not trying to put this in for any pejorative words here.

THE COURT: I will deny the motion to strike and make it clear 'that the only thing I find this is evidence of is the fact that since 1964 to date -- is that correct?

THE WITNESS: Yes, sir.

THE COURT: -- or 1965, a period of eight years,
there have been twelve inclances or so reported of policing

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reported by Mr. Arrow to Mr. Finkelstein which were settled to the satisfaction of 3M.

Mr. Arrow, you testified a few moments ago that

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the consultation agreement offered Frank Music Company was simply a different form of making an arrangement with Frank Music Company.

Can you tell me why 3M was offering Frank an agreement in the form of a consultation agreement?

- A Because Frank Music requested it that way.
- Q Did any other publishers request it that way?
- A No.
- Q Did the consultation agreement contemplate any services other than the licensing of the 25 compositions?
 - A The agreement --
- Q Would Frank Music have been obligated to render any services other than the licensing of 25 compositions?

MISS KRARSE: Objection. Calls for a legal conclusion, besides which, your Ponor, the document speaks for itself.

THE COURT: I think that this witness is very well-qualified to give a legal conclusion on the subject.

A I don't recall the document word for word and rether than make an error I prefer to look at At again.

THE COURT: If it is in evidence, can't I draw that

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conclusion?

Is it in evidence?

MR. TOPKIS: It is, your Honor.

MR. : BAKER: Yes.

THE COURT: Then I will. You can point out to me anything you want to about it.

MR. MRUSKA: I don't understand how your Honor cold draw your own conclusions from the face of the document since all the document says is that Prank Music will be paid \$22,500.

THE COURT: Doesn't say what for.

MR. HRUSKA: It just says for consultation and services but it does not describe what those services would be.

about whether it was obligated but whether it was contemplated that it would actually perform.

MR. ERUSKA: I believe that is right, your Honor.

THE COURT: Mr. Arrow, was it contemplated among
the parties to the Frank consultation arrangement that it
would actually perform any services other than license the
songs?

THE WITHESS: You mean was it contemplated by 3M or was it contemplated by Frank?

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THE COURT: Give me the answer on both sides if you know.

THE WITNESS: I don't believe 3M contemplated that Frank would perform any meaningful services.

I don't know what Prank's contemplation was.

or Mr. Arrow, at the time Frank Music made the decision not to enter into an agreement with 3M, with respect to the first series of the M700 cartridge, or at any time subsequent thereto, did you get the impression that Mr. Eramer's decision was largely that Frank Music Corporation simply did not want to be considered a maverick and just did not want to enter into the agreement?

MR. TOPKIS: I object.

THE COURT: Sustained.

MR. BAKER: Your Honor, I would like to offer at this time Mr. Arrow's prior testimony which appears at page 264 of the deposition, lines 9 through 13, as inconsistent with the testimony that he gave yesterday at page 1436 and 1437, for the purpose under Rule 32A of impeaching him as to this limited subject.

MISS KEARSE: I believe this is CBS' own witness, your Bonor.

you cannot impeach your own witness and the witness does

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not have to be shown to be hostile or anything else in order to impeach him.

There is plenty of authority on this and if your Honor wants, we can produce it.

There is a statement, for example, by Judge Lumbard of the Second Circuit, that refers to this as a pernicious and outdated rule and there is just no support for that proposition.

there is an apparant inconsistency between the witness'
live testimony and the deposition testimony, unless it
is barred by law, I would like to have the testimony on both
occasions so I can attempt to judge it for myself.

before he leaves the stand anyway, is to give him an opportunity to reconcile as far as the testimony and prior testimony if Mr. Arrow can do that.

MR. HRUSKA: I must just say here this is a particularly significant point, your Honor, in the light of the conflict between the CBS initial trial memorandum and the ASCAP reply memo on this precise point.

THE COURT: What is the subject we are talking about? What is the subject of this apparently conflicting testimony?

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mbg 7 Arrow - direct MR. BAKER: There is some prior testimony a would have answered the question I put to him to which the objection was sustained, in the affirmative, your Bonor. MR. TOPKIS: Oh, I think--MR. BAKER: His prior testimony. MR. TOPKIS: If your Honor had the benefit of the whole question and answer -THE COURT: The fact that I sustained an objecthat he answered.

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tion to a question seems hardly to be answered by some prior testimony. Maybe it was an objectionable question

I am confused. I thought you said that Ithe testimony was inconsister t.

If an objection was sustained I presume the witness did not even answer the question here on the stand.

MR. TOPKIS: That is right.

MR. BAKER: Yes, your Romor.

Yesterday I asked the witness, for all of the reasons, as to why Frank Music indicated to him that it had decided not to enter into an agreement.

He gave me those reasons. Among those reasons -

THE COURT: Yesterday?

MR. BAKER: Yesterday -- was nothing regarding the posit that Frank may not want to be considered a maverick.

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I showed him this passage and asked him whether that refreshed his recollection as to any additional reasons; andhe said that it did not.

MR. TOPRIS: That is right.

I still don't understand and I still find the question asked objectionable because it asks for what his impression, some body elsa's state of mind was, and I decline to receive the prior or present evidence on the subject.

MR. HRUSKA: Your Honor, what we want to inquire into is the basis for the impression. It is now out that on Mr. Arrow's deposition he stated that it was his impression that Frank Music simply did not must to be considered a maverick.

THE COURT: So I gather but --

MR. HRUSKA: Now we want to inquire into, your Remor, the basis for that impression.

We cen't do that unless we are first able to get from Mr. Arrow again the statement that that was his impression and then we fill try to --

THE COURT: Yes, you can, you can ask him if he came sway with an impression. You can ask him whether the impression was caused by acts or words of the people in question. You can ask him what acts or words caused him

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asking, them, and what I won't -- the only thing I am entitled to take is what kind of actions and words were there on the part of Frank so why don't you ask him what Frank did.

MR. HEUSEA: Which gave him that impression.

THE COURT: Why don't you ask him that? Never mind his impression. I am supposed to draw an impression from this, not Mr. Arrow.

MR. TOPKIS: If your Honor pleases, the question that was put to the witness at his deposition was:

"Did you ask him why they were not entering into a license agreement with 3M?"

"Answer: No."

MR. HRUSKA: Where are you reading?

MR. TOPRIS: The question from which you excerpted a part of the answer, page 343, lime 30.

MR. HRUSKA: 263.

MR. TOPKIS: 263, line 20.

THE COURT: That is the deposition?

MR. TOPKIS: That is right, your Honor.

Them the witness goes on to talk about his private epinion and his impression but he did not ask the question.

There is no --

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THE COURM: I understand.

I have made a ruling on this.

Now you can ask questions which are allowable within that rule.

BY MR. BAKER:

Q Mr. Arrow, in the late 1964, early 1965 period, did you receive an impression from Frank Music concerning the reasons which--

THE COURT: For which they refused.

Q For which they refused to deal?

ME. TOPKIS: I will object to the question.

THE COURT: I will allow the question whether he had an impression without saying what it was. The answer we know is yes.

- A Yes.
- Q What was the basis of that impression?

 THE COURT: Well, let's be more specific.

What actions or words on the part of Frank caused you to secure that impression?

THE WITNESS: I had a number of conversations with Mr. Kramer and Miss Cheiman about the situation. My general impression was that the amount of money involved from Prank's point of view was not sufficient to induce them to enter into this kind of agreement.

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THE COURT: Did they ever say so?

THE WITNESS: Mr. Kramer did, yes. Mr. Kramer told me that he regarded this as a departure from Frank's usual course of conduct, that it was something the company was just not ready to do at that time.

we did explore other ways to make the money
a little bit more usable to Frank, or better, which is
why we got into that consultative agreement situation, but
with it all, Frank Music just was not ready to enter into
the agreement

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Q Was there any indication to you of why they were not ready?

tion, the possibility that the music would be performed beyond the three years. We discussed the limited number of compositions which 3M was ready to use, which was a financial factor and it was Mr. Kramer's position that this was something new and the company just wan't ready to go into it.

Q I think you stated that it was a departure from their past practice.

In what respect was it a departure?

THE COURT: Well, that is what Kramer said, not what Mr. Arrow said.

I suppose we can all draw the conclusion that they had not done it before and therefore it was a departure.

I mean he did not say, "It is a departure," and then explain to you how it was a departure, did he?

THE WITNESS: Well, I think it was tacitly understood that the departure was that Frank had not licensed its performing rights in situations like this other than through ASCAP.

THE COURT: I think so, too. My guess is as

MR. HRUSKA: Particularly with me bobbing up.

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THE COURT: Well, he has gotten it from both sides, friends and opponents in the court.

BY MR. HRUSKA:

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Q When you discussed this 3M project with Mr. Kramer, did you make the point to him that if Frank went

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into the project they would be making some money and if they didn't go into the project, they would not, and so why didn't they?

A Yes.

And is your understanding that the only reason

Frank Music did not go into this project was because the

amount of money involved wasn't enough?

THE COURT: He hasn't testified to that effect,
Mr. Hruska.

Q Well, was that the reason given to you?

THE COURT: He said some of the reasons ex
pressed to him by Mr. Kramer were that there was not sufficient money in it, there was a limited number of songs

and that it was a departure from their prectices.

Q Did Mr. Kramer or did anybody else at Frank

Music and by that I mean to include Mr. Loesser, state to

you in words and substance that Frank Music believed

that it should not go into this project on a direct licensing

basis because they felt that performance rights should be

handled by ASCAP?

A Mr. Kramer stated that he would prefer to see the performing rights of the company licensed through ASCAP under these circumstances, rather than enter into the agreement with 3N at that time.

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Q Did he ask you--

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MR. TOPKIS: May the witness please finish the

Q I'm corry.

Were you not finished?

A think the expression at that time is important in the characterization of the entire discussions because it was never my impression when Mr. Kramer spoke to me as 3M's representative that he was closing the door for all time.

- Q Sorry. That he was what?
- A Closing the door for all time.
- O Did he indicate to you or did anybody else at

 Frank Music in icate to you in words or substance that

 Frank Music wanted to see what other publishers did before

 it entered into a direct licensing deal with 3M?

MR. TOPKIS: Your Honor, to say that these questions are leading is to say something fairly obvious. They are almost haranguing.

THE COURT: They certainly are leading, Mr. Hruska.

I continue not to believe that Mr. Arrow is a hostile witness in any way. His answers are very careful and limited but that is as it should be.

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I'll sustain the objection to the question.

Q Was anything said Ly Mr. Kramer or Mr. Loesser or anybody else at Frank Music--

THE COURT: The trouble is that you keep suggesting the subjects and that is what offends us.

MR. HRUSKA: I have to ask about something regarding --

THE COURT: Well, Mr. Baker has already asked Mr. Arrow to express the reasons given by anybody and let's be sure it is anybody, not just Mr. Kramer, viewing the proposal of 3M with disfavor.

I'll make it as broad as that but let's leave it up to Mr. Arrow to give us an answer.

MR. HRUSKA: Yes, sir.

THE WITNESS: I must say that I think there is a distinction between that question and the question that was asked.

THE COURT: Well, then let's get the answer to this one.

THE WITNESS: There was another reason given to me by Mr. Kramer but it was a reason which I did not regard as -- which I did not regard seriously. And that reason was that Mr. Kramer did not want to be considered a maverick.

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Why didn't you regard that seriously?

In the framework that the reason was contained in a memorandum, I regarded it as being stated with a mile.

And what was behind the smile in your regard? MR. HRUSKA: I'll move to strike the answer, then, your Honor, because the witness said that he regarded a statement in a memorandum as being made with a smile.

Now unless I can inquire into--

THE COURT: Just why did you regard it as being made with a smile?

THE WITNESS: The statement deals with Frank Music's being a stalwart of ASCAP. Frank Music was never a stalwart of ASCAP and neither was Mr. Loesser.

THE COURT: Therefore you considered this a bit of irony or sarcasm?

THE WITNESS: Yes.

THE COURT: This is a paper that we discussed yesterday?

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MR. TOPKIS: That's right.

MR. HRUSKA: That's right. Now we have got the thing really opened up, your Honor, and we have to go into it.

Q In what regard was Frank Music not a stalwart of

a member of the board of directors of ASCAP although it was my understanding that it had been suggested. Mr. Loesser, in particular, who was a prominent composer and a very gifted and talented one, had never served as a member of the board of directors of ASCAP. He, I think, declined to run.

It had consistently been his view that the company ought to stay out of what he considered to be extra curricular activities at ASCAP and just get on to the business from day to day of making money and publishing songs.

now a distinction in your mind between on the one hand serving on ASCAP committees, on the ASCAP board of directors and, on the other hand, recognizing the financial, economic advantages of dealing for performance rights through ASCAP?

Honor.

MR. TOPKIS: I object to that question, your

want to say, Mr. Hruska, that I really feel this is such an infinitesimal, inconsequential point about whether or not Mr. Frank said it with a smile or not -- after all he did say he didn't want to do it; he didn't want to depart from his normal arrangements; he didn't do it.

I am aware of the fact that many of these people may have been waiting to see what the other man was going to do, whether he did, whether he did or didn't, and we simply haven't got the time to spend on these minutiae.

MR. HRUSKA: Let me ask one more question on this.

Q Mr. Arrow, did Frank Music need the money at this time? By "this time," I mean the time during which you were attempting to interest Frank Music in issuing a direct performance rights license to 3M?

MR. TOPKIS: I object to that question.

THE COURT: On what ground?

MR. TOPKIS: On the ground that --

THE COURT: Assuming Mr. Arrow is competent to

MR. TOPKIS: The words "Did they need the mone

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The question was the one I read to you before
THE COURT: Mr. Arrow, I take it you know
something about what the financial condition of Frank
was at the time in question, am I correct?

THE WITNESS: Yes.

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THE COURT: Was its condition such that it

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was a bad period for it, was the cash short or anything of that sort?

THE WITNESS: No, it wasn't a bad period and the company wasn't cash shorted. We just regarded it as a favorable transaction for the company and we thought we could use the money.

THE COURT: They could use it?

THE WITNESS: Yes.

THE COURT: We estimate between \$7500 and \$15000?

MR. HRUSKA: A grarantes of \$7500 and an estimate of possibly \$15,000 per year.

THE COURT: I understand they could have used the money.

They weren't in desperate situations?

THE WITNESS: Not at all.

THE COURT: I could use the money, too.

MR. HRUSKA: Your Honor, I don't know that there was a ruling before and we would like to offer Mr. Arrow's testimony at the deposition --

THE COURT: I thought there was a ruling on one offer. I know there was.

MR. HRUSKA: Well, I am not aware of it. The testimony beginning at Page 263 at Line 20 --

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THE COURT: And counsel have agreed to your being excused and I think we should make arrangements, not necessarily on the record, as to when Mr. Arrow will return, and the sonner the better.

(Discussion off the record.)
(Luncheon recess.)

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EUGENE GOODMAN, called as a witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

THE COURT: Mr. Goodman, Mr. Hruska will question you over there. Will you speak up though so that we can hear you?

THE WITNESS: Yes.

THE COURT: He is going to be coming to that podium.

DIRECT EXAMINATION

BY MR. HPUSKA:

- Q Mr. Goodman, what is your position?
- A I actually don't know whether I am on -position with whom?
- Q Are you connected with a music publishing company?
 - A I am, several.
 - Q Can you give us the names of those companies?
 - A ARC. You want me to do them all, sir?

THE COURT: That is the question. I don't

know what Mr. Hruska wants.

- Q How many of them are there?
- A Ten or twelve.

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2	O Could you give us the ASCAP publishing companies?
3	A Jamell Music, MasterWest Music.
4	Q Bast-Hest?
5	A East-West. Shall I address myself to him or
6	to you?
7	THE COURT: No, address yourself to the attorney,
8	but if the reporter can't hear you, you will have to.
9	A East-Test Music. Sunflower Music; and others
0	whose names I can't recall.
1	Q About four or five of those?
2	A Yes, I would say so.
3	Q Which of your publishing companies do you con-
4	sider to be the principal chapany, that is with the
5	principal catalog?
6	A ARC Music Corporation.
7	THE COURT: Are these companies affiliated in
8	one way or other or are they
9	THE WITHESS: The case he has just asked me for,
0	sir, is a BMI company.
21	THE COURT: I understand that, but what I am
2	asking you is this one business enterprise or with many
3	entities or is it not?
4	THE WITNESS: No, its business is with many
25	partners. some are with one person, others are with

others.

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THE COURT: All right.

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Q Let's take Jewell for a moment. Do you have a proprietary interest in Jewel Music?

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A I do.

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Q Is the full name of that, by the way, Jewel Music Corporation?

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A No, it is Jewel Music Publishing Company, Inc.

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Q What is your proprietary interest?

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A I believe I own 25 per cent.

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Of the shares?

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A Yes.

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Q Who owns the remainder of the shares?

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A No, I am wrong, I own 50 per cent of that.

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Q Who owns the remainder?

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A My brother Harry Goodman.

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Q Are there any other of the publishing companies with whom you have a connection in which you own a proprietary interest?

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A Yes.

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Q The ones that you mentioned before?

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A Right.

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Is that proprietary interest 50 per cent?

A In some. In others they are 25 per c	some. In	others	CHEA	ar 6	43	her	Cent
--	----------	--------	------	------	----	-----	------

Q In all the companies in which you have a proprietary interest, does your brother Harry Goodman have a proprietary interest?

A Yes, he does.

Q Is his intrest the same as yours in each of those companies?

A You mean are we equally partners?

Q Yes, sir,

A Yes, we are.

Q All right. As to the companies which you do not own 50-50 with your brothers, where somebody else has a proprietary interest, could you give me the names of those companies and the other shareholders?

A Yes. ARC Music Corporation, with Philip

Chess and Revetta Feder, Sunflower Music, with Philip

Chess and Revetta Feder, Fast -West Music with Nat Tarnopol,
and Merrimac Music, Nat Tarnopol, Ghana Music Corporation

with Willie Dixon, Catalyst Music with Willie Dixon;

I think that's about it.

Q ARC Music, I think you mentioned is a BMI affiliate?

A It is.

Q And Merrimac, BMI or ASCAP?

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Willie Dixon.

I talk things over with them, my decisions.

these companies?

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Do the others participate in the management of

Well, they may not participate in the management,

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- Q Are you the chief executive of these companies?

 A I would say I am.
- Q Have you been the chief executive since these companies were formed?
 - A I would say so.
 - Q And that was in 1940?
 - A Give or take a double of months.

THE COURT: Were they all formed then at the same time or is it just that they have all been formed since 1940?

THE WITNESS: No, sir, no, some of them we started at the beginning, such as Regent Music. Did I mention that one before? I don't know.

- Q Regent, I don't think has cors out.
- A All right, Regent is one of our BMI firms and that was our first one, our first firm, and the other firm we had was Jewel. Well, not actually Jewel, we changed the name of our original firm which was called Harman Music, which was ASCAP.
- Q Regent Music is a new one that you mentioned.

 Is that one in which you have a proprietary interest?
 - A It is.
 - Q Is it 50 per cent?
 - A Yes, it is.

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Q And your brother has the other 50 per cent?

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Correct.

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Are there any other music publishing companies Q which you manage but do not have a proprietary interest Manage or administer, I think is the term. in?

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No. sir.

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Xerox copy of a computer pointout, which I guess I ought

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I would like to show you, Mr. Goodman, a to mark.

MR. HRUSKA: Have we marked this as Exhibit 865? I would ask for the original of the printout to be marked as 865. We will have to treat it in camera for the time being. This, your Honor, is a copy of or rather a section of a printout supplied to us by ASCAP as part of the ASCAP printout of the ASCAP performed works index. The section that I am dealing with concerns the Jewel Music Publishing Company, Inc., and I would like to

THE COURT: What use do you propose to make of this?

MR. HRUSKA: Very limited use. I simply want to show it to Mr. Goodman, ask him w ther, in a quick scan of this, these are his songs and the only reason I am doing that is to give some content in the record to the

significance of Mr. Goodman's catalog.

THE COURT: Using it as a quick way to get the names of his pieces before me?

Mr. HRUSKA: Yes, right, your Honor.

THE COURT: Any objection?

MISS KEARSE: I have not seen this document, your Honor.

THE COURT: Give Miss Kearse a copy of it, somebody, so she can inform nerself. You don't want to give her a copy?

MR. TOPRIS: I will be delighted to give her a copy, but it is a list of 438 songs. Is that going to help you?

THE COURT: I don't know what is going to help me.

MR. TOPKIS: One of them is the Woodchuck Song. THE COURT: I can't tell, but apparently Mr. Hruska would like me to have some general knowledge of the scope of the Jewel catalog.

MP. HRUSKA: Right.

THE COURT: I don't see much point in wasting time about that.

MR. TOPKIS: No, I couldn't care less.

Your Honor, this material was kept confidential

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because some of the defendants and the people producing it wanted it kept confidential. We don't care, if Mr. Goodman doesn't, I couldn't care less.

THE COURT: I don't know. Mr. Goodman, do you have any concern abou whether this document be kept confidential?

THE WITNESS: Can I have a copy of this, sir?
THE COURT: Do you have one, or can you?

THE WITNESS: Can I have one?

THE COURT: Certainly.

THE WITNESS: All right, fine.

THE COURT: But aside from that, do you care?
THE WITNESS: No.

- Q Could you look, Mr. Goodman, at the list of song titles under the name of Jewel Music and tell us whether you recognize those titles as being compositions in your catalog?
 - A Most of them appear to be songs in our catalog.

 (PX685 wasmarked for identification.)
 - Q Do you spot any that aren't?
- A I can't tell. I don't know every song in our catalog.

MR. HRUSKA: I would like to offer this document

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in evidence, your Honor, for the limited purpose I described.

THE COURT: All right. We will allow Mr.

Goodman, if he finds there is neither or not, to communicate it to Mr. Topkis and Mr. Topkis can bring it to my attention.

MR. TOPKIS: I will be delighted to.

The COURT: You can keep that if you want, Mr.

Goodman.

THE WITNESS: All right.

THE COURT: All right, it is received for the limited purpose of establishing that these songs are Jevel's songs.

MR. HRUSKA: Right.

(PX865 for identification was received in evidence.)

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Q Mr. Goodman, have you ever been a member of an ASCAP committee?

- I have been a member of a nominating counittee.
- That is the Publishers Nominating Committee?
- Let me think--
- What was the function of the nominating connittee? Letme ask that.

THE COURT: He said it was a nominating committee.

- To nominate.
- To nominate what?
- I am just trying to think, if you will just give me a moment. Publisher members.
  - 70 -
  - To a board.
  - The ASCAP board?
  - I don't recall what the board was, Frankly.
- I don't get really involved in those sort of things.
- Do you remember when you were a member of the ASC/P Nominating Committee?
- A I believe it was about three years ago or two yuars ago. I am not certain. Two or three years ago.
- Q You don't recall the positions for which you were nominating people?

| 1  |                                                         |
|----|---------------------------------------------------------|
| 2  | A I think, as I said, it was for publisher members      |
| 3  | of the board.                                           |
| 4  | Q Is Jewel Music represented by a law firm in the       |
| 5  | city?                                                   |
| ó  | A It is.                                                |
| 7  | Q Which firm?                                           |
| 8  | A Ohrenstein, Arrow, Silverman & Parcher.               |
| 9  | Q Is there any lawyer in that firm in particular        |
| 10 | who handles your matters?                               |
| 11 | A Yes, there is.                                        |
| 12 | Q Who is that?                                          |
| 13 | A Noel Silverman.                                       |
| 14 | Q Has Mr. Arrow ever worked on any of your matters      |
| 15 | A Yes, he has.                                          |
| 16 | Q Were you aware in 1964 or thereabouts that Mr.        |
| 17 | Arrow war then also representing the Minnesota Mining & |
| 18 | Manufacturing Company, which I will refer to as 3M?     |
| 19 | A I knew that.                                          |
| 20 | Q And at or about that time did Mr. Arrow approach      |
| 21 | you on behalf of 3M?                                    |
| 22 | A He did.                                               |
| 2  | Q What did Mr. Arrow seek from you on behalf of         |
| 2  | 4 3M?                                                   |
| 2  | A He sought to get some of my songs put on tapes        |

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Yes, sir. A

That is your signature on the last page?

It is.

Mr. Goodman?

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|------|----------------------------------------------------------|
| 2    | Q That is the license agreement that you were refer-     |
| 3    | ring to?                                                 |
| 4    | A That's the one he is referring to.                     |
| 5    | Q And the one you referred to in your prior answer       |
| 6    | to his Henor's question?                                 |
| 7    | A Yes.                                                   |
| 8    | Q Paragraph 12 of this agreement shows that 3M           |
| 9    | gave Jewel Music a guarantee of \$3,000 a year for each  |
| 10   | year of the term of the agreement.                       |
| 11   | Do you know how that amount of money compares            |
| 12   | with the total amount of your annual ASCAP distributions |
| 13   | for wired music?                                         |
| !4   | THE COURT: You are speaking of Jewel?                    |
| 15   | MR. HRUSKA: Yes.                                         |
| 16   | MR. TOPKIS: For wired music?                             |
| 17   | Q Do you know what I mean by wired music?                |
| 18   | A I do.                                                  |
| 19   | Q Musak, Seeburg and the like?                           |
| 20   | A I do.                                                  |
| 21   | MR. TOPKIS: It seemed to me otherwise described          |
| 22   | as electrical transcription.                             |
| 23   | MR. HRUSKA: Well, there are electrical transcrip         |
| 24   | tion licenses that the Harry Fox Agency issues to Muzak  |
| 25   | and Seeburg and other wired music services, yes, sir.    |

THE COURT: All right, Mr. Topkis.

MR. TOPKIS: If your Homos phenous, ASCAP makes mo distribution under thee item and I suggest the witness must inevitably be misled.

MR. HRUSKA: I suggest Mr. Topkis is wrong.

MR. TOPKIS: What we do distribute is under Overall Category, that embraces every kind of background music; and if they want that figure, we can supply it a lot more readily than test Mr. Goodman's imagination.

THE COURT: You mean it is not broken down so that anybody would know how much was attributable to wired music?

MR. TOPKIS: That is right, your Momor, it is

MR. HRUSKA: They are a column in the ASCAP distribution statement which is handed Wired Music and Related Services.

MR. TOPKIS: That is right.

MR. HRUSKA: I would be happy, your Homor, (1)
to get the distribution statements to Senal Basic and
other ASCAP publishing companies managed by Mr. Goodman; but
I would also like to probe the witness, own state of mind
right now.

THE COURT: Of course.

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MR. Hk ISKA: Regarding the comparison between the \$3,000 a year guarantee by 3M and the total.

THE COURT: All right, you are free to do so.

Just being sure you use the terms that are actually used.

MR. HRUSKA: Right, and let me restate the question for that purpose, your Honor.

Goodman, do you know how that figure of \$3,000 a year guaranteed to you by 3M compares to the annual distributions that Jewel Music receives from ASCAP in respect of wired music and related services?

- A I do.
- Q Could you tell me?
- A I believe that the amount I get from ASCAP is negligible toward this amount.

THE COURT: Is what, negligible?

THE WITNESS: Negligible.

Q Did Mr. Arrow indicate to you at or about the time that you signed this agreement with 3M that the amount you would be receiving from 3M was likely to be higher than the guarantee of \$3,000 a year?

MISS KEARSE: Objection, your Honor.

MR. TOPKIS: If your Honor pleases--

MISS KEARSE: It calls for a hearsay statement.

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I will now defer to Mr. Topkis.

MR. TOPKIS: My objection is that it is leading. I have no objection to a conversation coming out but I'd like it in the usual fashion without any leading.

THE COURT: Sustained, as to the leading element.

Q Did Mr. Arrow at or about the time you saw him--

THE COURT: Just asking; did you have a conversation with Mr. Arrow as to how much money you might expect from the 3M license?

THE WITNESS: I did, and I got it in the way of this contract.

THE COURT: I am not asking that question.

You did have a conversation?

THE WITNESS: I did, sir.

THE COURT: All right, can you tell us what Mr. Arrow told you?

THE WITNESS: I think I cam't give it verbatim but to the best of my recollection he said it was a way to make some money for us.

THE COURT: Did he mention a figure beyond this \$3,000 quarantee?

THE WITNESS: No, sir.

Did he mention a figure in comparison with that \$3,000 a year guarantee?

| i |                                                           |
|---|-----------------------------------------------------------|
|   | A Well, I believe he mentioned this figure.               |
| ? | Q Was there any indication that the actual amount         |
|   | you might receive would be more than \$3,000 a year?      |
|   | A Not to my recollection.                                 |
|   | Q Were you aware at or about the time you signed          |
| 7 | that agreement with 3M that the money from 3M would be a  |
| 8 | new source of revenue for Jewel Music?                    |
|   | MR. TOPKIS: Objection.                                    |
| 0 | TEE COURT: Isn't that obvious?                            |
| , | MR. HRUSKA: No. It is true but it may not be              |
| 2 | self-evident, your Honor.                                 |
| 3 |                                                           |
| 4 | THE COURT: I credit Mr. Goodman with I don't              |
| 5 | want to waste time on it but it seems to me that it is    |
| 6 | obvious that Mr. Goodman knew it was a new source of mone |
| 7 | However, to make absolutely sure, did you know            |
|   | it was a new source of money?                             |
| 8 | THE WITNESS: Yes, I knew there would be new               |
| 9 | moneys coming in, sir.                                    |
| 0 | Q Did you know that you would not have to lose            |
| 1 | any money in order to get the money from 3M?              |
| 2 | MR. TOPKIS: If your Honor please, haven't we              |
| 3 | got something more important than this?                   |
| 4 | THE COURT: Sustained.                                     |

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Q Mr. Goodman, if 3M had come to you in the first

instance, for a direct license, without ever having gone to ASCAP, would you have suggested that 3M go to ASCAP?

MR. TOPKIS: Objection.

THE COURT: Sustained.

I see no basis for asking such a hypothetical quustion.

MR. HRUSKA: I submit, your Honor, that that hypothetical question goes to the core of the bypass issue.

THE COURT: It may but any answer that Mr.Goodman gave on the subject would in my opinion be worthless; from aprobative point of view. It might be interesting conversation.

I have to judge these things myself and my ruling stands.

MR. HRUSKA: Since this matter is so uniquely important to us, your Honor, I wonder if you would permit me to just take one minute of the Court's time.

point that is raised is described as uniquely important and of course at a particular time it is uniquely important, but everything can't be uniquely important.

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MR. HRUSKA: I think many of the points that have fallen in this category are the same points.

THE COURT: They are unique and they are impor-

NR. HRUSKA: You se, it all goes to the same proposition. I really don't want to belabor it and spend the Court's time, but we are attempting to show the state: of minds of --

Goodman thought about this at the time and what his state of mind was, but you are not asking that.

You are asking him to tell me now what a state of mind might have been if he had the state of mind five years ago.

MR. HRUSKA: Les me approach it this way thenQ If 3M now approached you on a new background
music series and had come to you in the first instance
without going to ASCAP first, would you suggest that 3M go
to ASCAP first?

MR. TOPKIS: Today?

MR. HRUSKA: Yes.

MR. TOPRIS: It seems to me to be totally irrelevant. There is a state of facts prevailing after all.

THE COURT: At least it is a more admissible

question.

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I'll allow you to cross-examine as to whether
the state of affairs today is different, from them, and so
on.

Would you answer that, as you can?

A I would treat it as any of er business proposition.

THE COURT: How is that?

THE WITNESS: That if someone gives me something on a piece of paper for x prober of dollars, I'll take it back to my office and perhaps talk it over with my lawyers and consider it.

THE COURT: In other words, you would not make

any particular precondition to the consideration of that?

THE WITNESS: Exactly.

MR. IRUSKA: I would like to offer in evidence, your Honor, and read into the mesonal the following passage from the deposition of Mr. Goodman takem in this case on June 19, 1972. It is on page 28.

THE COURT: Now, don't read it to me until Miss

Kearse has an opportunity to say that you should not read

it to me.

MISS KEARSE: Your Honor, Mr. Hruska should not

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THE COURT: What is your comment?

MISS KRAPSE: I would like to know what the basis for officering this is, first of all.

MR. HRUSKA: It is page 89, beginning at line 20 and it goes through page 30, line 9.

The basis of the offer, your Bonor, is that this is a passage which contradicts what Mr. Goodman has just said.

THE COURSE In your view?

MR. HRUSKA: Yes, sie.

MR. TOPKIS: Your Honor, I submit it is not, for this reason -- and I won't go into the subject matter.

The question to which Mr. Goodman assessmed just now was what would you do today.

The question he was asked on this deposition was if IN had come to you in the fixes insequence without ever harring gone to ASCEP mine years ago, white would you have done?

year Honor, is the next question and answer brings it up to date and I submit, your Honor, that there can be no real ruling on this and no clarify on the record unless I am entitled to read this portion of the deposition.

THE COURT: The only way I can sove the kind of

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Bonor.

issues that are continuing to come up of this sort is to allow you to quetion the witness is regard to his prior testimony and to ask him to reconcile what he just said with what he said before.

That does not mean that I am accepting that or allowing you to read it into the record as evidence in the case on trial.

MR. HRUSKA: I'll be happy to proceed that way, in the first instance, in any event.

THE COURT: All right.

Let him look at it.

MR. HRUSKA: Let him look at it and then I'll quest'on him.

- Q Could you read it to yourself?
- A Read what to myself?
- Q Page 29, line 20, through page 30, line 9.
- A Yes, I have read it.
- Now, could you tell us how you would reconcile the statement in the deposition which you have just read with the answer you gave to the last question?

MISS KEARSE: Your Honor, I direct. There is really no inconsistency between the portion Mr. Hruska has-

MR. HRUSKA: That is a lawyer's argument, your

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THE COURT: I'll have to look at it to see what I can deduce from it.

MISS REARSE: The question that Mr. Hruska has indicated to start reading with is the question which was objected to and to which the objection was sustained.

tion as to an inconsistency. It simply means that the question and answer on this occasion do not become part of the trial record.

As I just said, I agree they don't, but even if a man answers an objectionable question, he can later be asked how he reconciles the answer he then gave with the answer now.

MISS REARSE: But he hasn't answered this question because the objection was sustained.

THE COURT: But he gave an answer now, in court, which Mr. Bruska claims is inconsistent with the answer he did give to an objectionable question on deposition.

I must look and see if I agree that it is inconsistent. If it is inconsistent, then I think Mr.

Bruska can question him as to the reconciliation, if any,
even though what he answered on deposition I will not
regard as evidence in the trial.

Mr. Goodman must certainly think lawyers are funny

people.

THE WITNESS: To say the least.

THE COURT: I'll allow you to ask Mr. Goodman to explain, to reconcile the answer he gave now.

Let me see if I can make it clear to nim.

Mr. Goodman, you were asked by Mr. Hruska whether if you were asked by 3M today to enter into a direct agreement with them, you would make it a precondition that they go to ASCAP first and if I understand your answer correctly, it adds up to saying no, you would not make it a precondition; if you thought it was an interesting deal, you would look at it.

THE WITNESS: Exactly.

THE COURT: The answer which you gave here appears to be somewhat at odds with the answer you gave in court today.

Can you reconcile them for us?

THE WITNESS: Yes. Because I think differently today from what I did then. Today I would entertain it because today the business has become cut-throat and it is a matter of dollars and cents with me today and therefore I would go to a direct deal today.

THE COURT: Thank you.

Q Has the business become cut-throat since June 9,

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1972?

- A I would say I have changed my way of thinking about it since then.
  - Q Since June 9, 1972?
  - A Correct.
- Q Have you talked, Mr. Goodman, to anybody prior to coming here today about your testifying here today?
  - A I have.
  - Q Other than members of your family?
  - A What do you mean by my family?
- Q Well, have you talked to, I say, other than talking to members of your family.

THE COURT: Es doesn't mean you have.

- A Yes, I have. I have talked to --
- Q To whom?
- A My attorneys.
- Q Mr. Arrow?
- A Mo.
- Q Mr. Who?
- A The gentleman in the back who represents the firm.
  - Q What is his name, sir?

    MR. CINQUE: My name is Robert Cinque.
  - Q Have you talked with any attorneys for ASCAP?

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- A I have.
- Q And with whom did you speak?
- A They can give their names, please.

MR. HRUSKA: Mr. Gitter and Mr. Belnick.

- Q Did they show you the sequence or the passages of the deposition that you just read and testified about?
  - A Did they show me what? What did you ask?
- Q Did they show you the passage of the deposition that you just testified about, the passage of your deposition?
  - A They didn't show me this deposition.
  - Q Did they discuss it with you?
  - A Thedeposition, this deposition?
  - Q Yes.
  - A Yes.
- Q And did they discuss that passage we have just been talking about?
  - A Yes.
  - Q Did they suggest to you how questions concerning that passage might be answered?
    - A They did not.
- Q Could you tell us the substance of the conversation that you had regarding that passage of your deposition?

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| 1     | A I   | didn't | have   | any  | qua | estioning | with  | them   | on  | spe-  |
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| cific | items | . We w | ment o | ver, | 100 | generali  | sed o | n this | s t | hing. |

0 Who said what?

A Well, if you want me to start with the Chinese food, I can take all day here and then ask what did I say and what did he say.

Q No, sir. I just want you to focus on the deposition. What was said about the deposition?

- A They said to me, "Did you see this deposition?"
- Q Yes?
- A And I said, "No, I have not seen this deposition."

  I told my lawyer I'd never gotten a copy of this

  deposition.
  - Q Right.

Anything else?

- A Yes. They said they wanted me to come up here and be very truthful and tell it in my own way.
  - Q Right.

Anything else? Anything else, sir?

- A Wait a minute. Let me think so I can tell you.
- Q All right.
- A Yes, they asked me if I knew-- if I knew whether

  Allen Arrow represented both clients at the time and I

  said I did. That is the best of my knowledge.

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What kind?

Premium records. They all have special names for them but not necessarily rold for one dollar, sold for different prices.

Q Right.

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A And I think CBS is really fooling everybody as to what they sell for and what they get.

Q I see.

MR. HRUSKA: I move to strike that testimony, your Honor. It is not responsive, the last answer.

THE COURT: Overruled.

Q Ndw, Mr. Goodman, were there any other facts in that category?

A Wo. That is basically the reason. I don't want to do anything but compete with my publishers today.

Q The fact that Chappell is giving mechanical rights to CBS?

A Not Chappell, all of them.

Q The fact that Chappell is giving mechanical rights to CBS at half a cent?

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THE COURT: He said that wasn't the only thing.

MR. HRUSKA: He said it in the middle of the question, your Honor. I wanted to finish the question.

A That Chappell is giving rates and that Warner Brothers are giving rates and all the conglomerates are all giving rates in order to make a bigger gross.

- Q To photograph record companies?
- A Right.
- an offer by 3M today on a direct performance rights licensin-

A That's correct.

MR. TOPKIS: I object to the form of the question.

THE COURT: Why? I mean, what is wrong with the form?

MR. TOPKIS: The witness, it seems to me has testified before that he wouldn't entertain anybody who comes to him with money in his hand.

THE COURT: Mr. Hruska is trying to find out why he would today when he wouldn't ten months ago -- 11 months ago.

MR. TOPKIS: He didn't say 11 months ago that

he wouldn't do that.

MR. HRUSKA: That's a matter of interpretation.

THE COURT: I think his answer can be construed in that direction. I think Mr. Goodman himself has indicated that he didn't think that was an unfair construction.

But, I will sustain the objection because I think that you are asking a question on the assumption which is not so, that Mr. Goodman has said that the only reason that he will not and that he will entertain a direct offer today is because mechanicals are down to a half a cent. He described the fact that the market in his industry is cut throat.

If you want to ask him what other factors make it a cut throat market, you can do that.

factors which have arisen since June 1962 which now lead you to the state of mind that you would entertain an offer from 3M if they came to you in the first instance, rather than having gone to ASCAP in the first instance?

MR. TOPKIS: If your Honor please, I submit this is all irrelevant. This man gave 3M a license back in 1965. What is all this about? What are we wasting time for? If 3M came to you today wearing a red shirt --

of these monstrous propositions he has to prove because it is not mathematically provable, that Mr. Goodman wouldn't have done it if there hadn't been a prior approach to ascar which had had negative results.

MR. HRUSKA: Mr. Goodman and every other publishers who dealt with 3M.

THE COURT: I understand.

MR. TOPRIS: I beg your pardon.

TTE COURT: I understand that is what he has asserted.

I will allow the question, but can't we be less solemn about it.

Is there anything else that made this a more attractive proposition now than it was in June of 1972? Anything besides this fact that competition in records was going on.

THE WITNESS: Competition is keener among publishers.

THE COURT: Is it keener in anything besides recording rates?

THE WITNESS: In everything. In giving away.

I understand, some publishers are giving away their musical rights so as to cause performances.

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with it. You may think he is dissembling or not, but he

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now and he would take some kind of things he wouldn't have taken before.

Is that right, Mr. Goodman?
THE WITNESS: Correct.

Q Do you, Mr. Goodman, compete on a price basis
with any other publisher to your knowledge in the licensing
performance rights to broadcasters?

MR. TOPRIS: Objection.

THE COURT: Overruled.

THE WILNESS: Repeat the question.

THE COURT: Would you answer that?

(Record read.)

A I do not.

Q Do you know why?

MR. TOPKIS: Objection, your Honor. What does that call for? An analysis of the way the music business operates.

MR. HRUSKA: Your Honor, if I cannot get at the inconsistency between this witness's testimony on his deposition and his testimony today, it is going to be exceedingly difficult effectively to get at what I believe to be the actual state of this witness' mind, his actual attitude on this question.

I think we are now in the area of crossexamination and there is no way I can examine this witness effectively unless I can attack his prior testimony here.

talking about, your Homor? The witness is asked the question and he gives an answer and then he is asked another question, I object and I am told it is because there is some inconsistence.

What inconsistence?

MR. HRUSKA: I respectfully submit that there is no rule --

possible that Mr. Goodman's prior testimony on this point is inconsistent with his answer today and I also recognize his reaction to that suggestion as not necessarily agreeing with it and I will allow Mr. Hruska reasonable latitude to examine Mr. Goodman and I will allow the question just put.

The question that was just put was do you know why -- I myself would put the question why, not do you know why, but why does your company not compete with others on a price basis in regard to the licensing of --

- Q Performance rights to broadcasters.
- A I don't know that we don't compete with others.

|         | l:                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
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| licensed | to | tel | levi | sion | ne | etwo | orks | throu | agh 2 | SCAP | or | by   | ASCAP? |

A I am.

Q Does that indicate to you whether or not you are competing on a price basis with other music publishers in the licensing of performance rights to television networks?

MR. TOPKIS: If your Honor please, there isn't any factual issue here. Anybody who licenses through ASCAP of course doesn't compete on a price basis with anybody else.

MR. HRUSKA: I am offering this simply to get at the witness' state of mind.

MR. TOPKIS: What difference does his state of mind make?

THE COURT: Well, I am led to believe that Mr.

Hruska is going to establish or try to establish, is a
better way to put it, an entire sector of this case that
shows a pattern of thinking that is cognizable by the
Court as having probative value to the ultimate issues
here.

If he doesn't, if he fails, he fails. But

I think he is entitled to an opportunity to establish
that pattern.

Now, that is a separate question from whether some of the things that Mr. Hruska is now asking are so clearly demonstrable that they don't need further testimony on that point.

Why do we need to ask him whether he licenses at the same rates when we all know that everybody licenses at the same rates.

MR. HRUSKA: Can the witness be excued for a moment and I can explain it? If the witness is in the room --

THE COURT: Would you step out in the hall there, Mr. Goodman?

(The witness left the courtroom.)

MR. HRUSKA: The witness has said, your Honor, that he would today entertain a 3M offer, even though 3M did not initially go to ASCAP, whereas he would not have in June of 1972.

THE COURT: Let us assume that is what his testimony is.

MR. HRUSKA: The difference in his mind being, he says, the fact that a great amount of price cutting has occurred between that time and now.

Now, logically, I want to establish that that, and through this witness, get him to admit, in

effect --

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THE COURT: I know what you are trying to get him to admit.

MR. HRUSKA: That that is not a sensible point of view.

Mow, to get him to focus on the fact that he does not compete on a price bas's in the licensing of television networks because ASCAP does that quite possibly will get him to focus on the fact that he would not be competing on a price basis in the licensing of performance rights to somebody like 3M if ASCAP could do that first and to get him to recognize the same self-interest which I believe prompted his answer in June 1972, that performance rights licensing ought to be done through ASCAP. To get him to recognize that today.

THE COURT: I question whether he will be able to do any of them if I allow the question.

MR. HRUSKA: I won't be able to.

THE COURT: With interruptions and objections at every question. That willmake it more difficult.

MR. TOPKIS: I will do my best to make it impossible. I can't imagine a greater waste of time, your Honor. This poor man obviously didn't understand the questions that we put to him back in June of 1972, and --

THE COURT: Mr. Topkis, let's not argue all the merits of that. I am inclined to think that unlikely in view of the fact that he didn't say so.

MR. TOPKIS: He didn't have an opportunity to.

Objection was taken.

THE COURT: You can cross-examine him.

MR. TOPKIS: All right, but what difference can it possibly make, your Honor? Surely we are not dealing with it solely to go from here to there to there to there to there, to get back to an abstraction. It is a waste of time. I sympathize with Mr. Hruska's problem but I don't think the way to solve it is to ask this witness to speculate what might be in never, never land or whether he understands he is competing on price terms, which of course he isn't, except to the degree by the way that

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he belongs in both ASCAP and BMI and to the degree that they compete; he is competing with himself.

THE COURT: Miss Kearse?

proper forum for Mr. Hruska to attempt to persuade the witness that his position is not semsible, and that if he were to recognize certain things, he should change his view, which is just what Mr. Hruska has said he is attempting to do in this examination. That is not getting at the facts. That is an attempt at persuasion.

THE COURT: Of course cross-examination is often an attempt to persuale the witness to agree that something else is true.

Mr. Hruska, my feeling is that I would really get lost in the swamps of this exercise if it proceeded.

Sometimes I feel that CBS understandably cautions us, credits me with less understanding of human nature and the obvious than I and my colleagues have, and I understand that you propose to demonstrate that his original answer was true.

I think you have the material with which to work to demonstrate that without taking forever, and we all know what the structure of the industry is, and most of the

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points that you are making are points, it seems to me, that are for argument on the basis of ordinary economic motivations of the average American businessman.

MR. MRUSKA: May I offer his prior answer in evidence?

THE COURT: Yes.

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inquiry.

MISS KEARSE: May . know what answer you are talking about?

THE COURT: The one that we have been fussing about.

MR. HRUSKA: Page 29, Line 20, through Page 30,

THE COURT: Yes.

MR. TOPRIS: Our objection is noted, I take it?
THE COURT: Right. Let's limit that line of

MISS KEARSE: May we reserve our right to read in other portions of this deposition?

THE COURT: Certainly.

MR. TOPRIS: Shall we summon the witness back from the men's room or wherever he is?

THE COURT: Yes. We will supply this to the reporter and you can just copy it in.

(The parties of the deposition referred to is

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| without  | ever  | has | vin | g c | ome | to | ASC | CAP, | you | 2 W | ould | have  | suggested |
| that the | ey go | to  | AS  | CAP | ?   |    |     |      |     |     |      |       |           |

"Mr. Blumstein: I will object to the form of that question too.

\*The Witness: Repeat the question, please.

\*(Question read.)

\*A If I knew them what I know now, the answer is yes.

"Q What do you know now that you didn't know then?

"A I know more about the publishing business than
I know then."

(Recess.)

BUGENE GOODNIN resumed.

DIRECT EXAMINATION (continued)

BY MR. HRUSEA:

Q Mr. Goodman, to you believe that it is wrong for ASCAP members to compete with ASCAP in the licensing of performance rights?

MR. TOPKIS: Objection, your Honor.

THE COURT: Overruled.

- A No, I do not.
- Q I would like to show you a passage of your

tion?

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through Line 24.

THE COURT: Is this again on the claim that
you believe Mr. Goodman said something else on his deposi-

MR. \_AUSKA: Yes, your Honor.

deposition on Page8, beginning at Line 18 and going

THE COURT: Again I better look at it and see if I agree there is an inconsistency.

MR. HRUSKA: Page 8, beginning at Line 13 through Line 24.

an inconsistency between the answer given on the deposition and the present one, but I will allow you to ask

Mr. Goodman how he reconciles his present answer with the
former answer.

MR. HRUSKA: That is the question, yes.

Q Mr. Goodman, can you reconcile your present answer with the answer you gave on Page 28 of the -- at the indicated line?

THE WITNESS: Your Honor, would you think that is basically what I answered before when I said I have changed my opinion and I am now willing to compete with all my confreres, and I have changed my line of thinking since that date?

THE COURT: I don't know whether that is the SOUTHERN DISTRICT COURT REPORTERS
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answer, but if you say it is the answer that is the answer. We are asking you what your explanation is.

Is that your explanation?

THE WITNESS: That is my explanation.

MR. HRUSKA: I offer the passage just referred to from Mr. Goodman's deposition in evidence.

MISS KEARSE: Objection.

THE COURT: I will receive it for whatever probative value it has.

Q Mr. Goodman, do you believe that it is important
to you as a publisher to combine with other publishers
and have a common licensing agent for the licensing of
performance rights?

THE COURT: Let's not go through every single question Mr. Goodman was asked on deposition. If you want to ask him to read certain passages and ask him whether he would give the same answer to any question, it is just that we have so much to do that I don't feel we can take the time that would be necessary for exploring every answer that Mr. Goodman gave.

Are there many?

MR. HRUSKA: Just two or three more.

THE COURT: Let's see if we can't find some speedy process.

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|------|------------------------------------------------------------|
| 2    | MR. HRUSKA: In fact there are three in toto                |
| 3    | including this one, your Bonor, three in toto, including t |
|      | one I just asked. But I would be happy to do it that way.  |
| 5    | THE COURT: All right.                                      |
| 6    | Q Could you read, Mr. Goodman, Page 28, beginning          |
| 7    | Line 25 through Page 29, Line 4.                           |
| 8    | A May I have a pencil, please, to mark those?              |
| 9    | (Pencil handed to the witness.)                            |
| 0    | THE COURT: While he is doing that, let me read             |
|      | it so I can understand what the claim is.                  |
| 2    | MR. HRUSKA: Page 28, Line 25, the very bottom              |
| 3    | line, through Line 4 on Page 29.                           |
| 4    | Q Would you give the same answer today, Mr.                |
| 5    | Goodman, to t hat question, that you gave in June 1972?    |
| ó    | A No.                                                      |
| 7    | Q What has occurred or what facts have come to             |
| 9    | your agency to change your answer?                         |
| 9    | A Do you want me to go back and tell what I think          |
| 20   | about the rates, etc., the whole structure?                |
| 21   | THE COURT: No, all you have to do, Mr. Goodman             |
| 2    | don't try to make us foolish either. All you have to       |
| 23   | do is give the same reasons.                               |
| 34   | THE WITNESS: The same reasons as before?                   |
| 25   | THE COURT: Allright, we don't know that. It has            |

to go on the record in this case. The Supreme Court of the United States and the Judges down there don't necessarily know what is on your mind at the moment.

THE WITWESS: All right.

MR. HRUSKA: I offer that passage in evidence.

THE COURT: Received for the same restricted purpose, noting a continuing objection on the part of the defendant.

Read it into the record.

I would like you to look at, Mr. Goodman, Page 29 of your deposition, Lines 5 through 8, and line 19. THE COURT. When Mr. Goodman is fin hed, lat me ask a few questions.

Mr. Goodman, am I correct that today you would not give the same answer that you gave in those lines? THE WITNESS: Correct, sir.

THE COURT: Am I correct in understanding the reason you would not is the same reason that you have given to the other questions?

THE WITNESS: Before, right, sir.

MR. HRUSKA: I offer that passage in evidence. THE COURT: Received for the same purpose and with the same objections noted.

The last one of these I want you to look at Q

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Mr. Goodman is Page 30, Line 10, through Line 15.

A I gather from this that what you are saying to me that once they have license there is no need to come to me for a license, they already have it?

Q The question is, once ASCAP has undertaken to offer licenses --

MR. TOPKIS: No.

-- to a category of users, do you believe that the member should refrain from dealing with those users?

MR. TOPKIS: I submit, your Honor, that the witness' last comment demonstrates that the objection to form was well-taken. That objection should now he sistained.

THE COURT: What was his comment? I didn't understand it.

MR. TOPLIS: Will the reporter read it back? MR. HRUSKA: Can we have the witness give it rather than Mr. Topkis.

THE COURT: What is your comment?

THE WITNESS: I said once they have a license from -- through ASCAP, what is the point of coming to me? THE COURT: Are you saying that is what you understand the content of this question to be?

THE WITNESS: Right.

THE COURT: I don't know if that sustains the objection as to form but it may reconcile what would be a different answer to that question if it were asked.

MR. HRUSKA: It presumably, your Honor, would be the witness' basis.

Q Let me ask you now, Mr. Goodman, do you believe that once ASCAP has undertaken to offer licenses for a category of users, that the members of ASCAP should refrain from dealing with those users directly?

MR. TOPKIS: I object to that question as a matter of form, your Honor.

THE COURT: I don't see the objection to the form of it.

Overruled, Mr. Topkis.

MR. TOPKIS: If your Honor pleases, we have no alternative but to offer licenses to all comers under the amended final judgment.

THE COURT: That isn't denied. Mr. Goodman is simply being asked whether under those circumstances he has a certain point of view.

You may say the point of view is taken without

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knowledge of the full facts, and I will hamb to take that into consideration.

MR. POPKIS: Yes.

they don't assept an offer, or for me to compete with

What is the point?

THE COURT: Are you asking a question?

THE WITNESS: Yes, I am, of you, sir.

THE COURT: As I understand it, Mr. Bruska

is seking you whether you b lieve that if ASCAP merely

offers but has not actually granted a license to a proposed

licensee--

MR. HRUSKA: Category.

THE COURT: -- a cotegory of users, that then under those circumstances the members of MSCAP should refrain from dealing with those.

THE WITHNES: I doubt very much if today I would refrain from dealing with them.

THE COURT: As long as they And not already have

THE WITNESS: Right.

THE COURT: Your answer at the time of your deposition appears to be differ :.

GUETHANG DISTRICT COURT REPCATERU TOUTED STATES COURT HOUSE FOLLY SQUARE, N. 1., M.Y. 10007 TELEPHONE: CORTLAND 7-680 THE WITNESS: Not consistent with what I said here.

THE COURT: Different, and am I correct in understanding that the reason for the difference is because of the factors you have previously enumerated?

THE WITNESS: Yes.

MR. HRUSKA: I offer that passage in evidence, your Homor.

THE COURT: Received on the same basis.

Let me just make this statement for the record.

Because of the confusion of introducing this material
into the record serially with the material that the reporters have already taken, I am stating for the record
that the material referred to in Mr. Goodman's deposition
of June 1971 will be found at the end of the volume in which
this passage occurs.

- Q Mr. Goodman, are you a member of the NMPA?
- A I am.

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- Q Have you served on any committees or on the board or the governing council of the NMPA?
  - A I have not.
- Q You have referred a little while ago in your testimony to price-cutting by music publishing companies in a field of licensing mechanical rights.

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Have you ever discussed that subject with Mr. Al Berman?

MR. TOPRIS: Objection, your Bomor, on two grounds.

One, the witness did not refer to price-cutting; that was Mr. Hruska's felicitous phrase, and second, it is irrelevant..

Suppose the witness did or did not discuss pricecatting with Mr. Berman. What difference does it make
in this litigation?

THE COURT: I don't know. What is the proposed connection here?

MR. BRUSKA: Here again, your Homor, the frame of reference.

THE COURT: We can't have an objection to every question. We are all lawyers and we can cut out any of this stuff that is useless to us at this time.

Mave you talked to Mr. Berman about it?

THE WITNESS: Yes, I have.

THE COURT: Will somebody identify Mr. Berman for

me?

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THE WITNESS: He is the head of the Harry Fox office which issues our licenses.

THE COURT: I know the Harry Fox office. I

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didn't realize that is the Berman you are talking about.

He is the gentleman who testified?

MR. HRUSKA: Yes, your Bosor.

THE COURT: All right.

Q Have you indicated to Mr. Berman that Mr. Berman should speak to publishers who have been cutting prices on mechanical rights?

MR. TOPKIS: Objection, your Honor. It is leading and this is going into the most delicate of areas inwolving people who are not parties here and not present.

THE COURT: Sustained.

I am not interested in arrangements between nonparties as to what they might do to shore up the industry even if they may be questionable practices or illegal.

I am trying this case, not another one.

- Q Do you know Mr. Sal Chiantia?
- A I do.
- Q Have you ever discussed this subject with Mr. Chiantia?

THE COURT: Which subject?

- Q Price-cutting on mechanicals.
  - MR. TOPKIS: Same objection.

THE COURT: Yes. I don't know anything about price-cutting. Anyway, you mean the lowering of prices.

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- A Giving races, yes, I have.
- Q Have you discussed it with any representative of Warner Bros. or Music Publishers Holding Corporation?
  - A No, sir.
- Q Have you discussed it with Mr. Brettler of Shapiro-Bernstein?
  - A No, sir.
- Q Are you aware of any discussions as among publishers or any effort by publishers to persuade other publishers who have been offering rates on mechanicals not to do so?

ject of rates came in just as an explanation by Mr. Goodman of the reasons for his change of mind.

That may or may not be persuasive but I don't think we have to make a total examination of it or conditions of exchange of information by people for that purpose.

I don't know whether this is attempted crossexamination of Mr. Coodman on the point he raised or not.

MR. HRUSKA: No, your Honor.

THE COURT: Then what are the connections with the issues at large? I thought it had to do with Mr. Goodman's credibility.

MR. HRUSKA: No, I don't thinks thinks goes to Mr. Goodman's credibility yet.

THE COURT: Is it for the passence of going in that direction?

MR. ERUSEA: No.

It is for the purpose of establishing that music publishers have made efforts to persuade some publishers who are offering unusually low rates on machanicals not to de so.

THE COURT: So I gather, but what connection

MR. HRUSKA: Your Honor, we believe that this is emother example of an occasion in which music publishing companies have joined ranks against a threat to the industry.

THE COURT: It is intended to be a part of the

MR. HRUSKA: Yes, your Honor, passingsity.

to propensity or whatever this may be is welles so circumstances, as I understand it, admissible.

THE COURT: I don't think Mr. Erossia is trying to bring out propensity. I think he is trying to bring out astualities and I won't hear anything about aptuality.

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MR. TOPKIS: To establish propensity by demonstrating actuality in another situation is exactly the way such things are always done but you don't do it this way.

What are we going to do now, try the issue of what really happened?

THE COURT: I think it unduly broadens the questions before me. I think that there is a great deal of material with regard to the central issues and that is going to be difficult enough to deal with, and such other questions it seems to me would be so peripheral that they would not cast much light on the issue here.

MR. HRUSKA: The objection is sustained, your Bonor?

THE COURT: Yes.

MR. HRUSKA: I have no further questions of Mr. Goodman.

MR. TOPKIS: With your Honor's permission,
Mr. Gitter will examine this witness.

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## CROSS-EXAMINATION

## BY MR. GITTER:

| Q | Mr. | Goodman, | are | you | any | relation | to | Benny | Goodman |
|---|-----|----------|-----|-----|-----|----------|----|-------|---------|
|---|-----|----------|-----|-----|-----|----------|----|-------|---------|

- A I am.
- Q What is the relationship?
- A I am a brother.

Did you come here to embarrass me?

Q No. Quite the contrary.

THE COURT: I think he is a wonderful guy but what does that prove?

Q Mr. Goodman, you testified in examination before trial in this case?

A I did.

Q Do you remember giving the following answers to the following questions:

MR. HRUSKA: The page and line, please?

MR. GITTER: Page 19, lines 7 forward.

MR. HRUSKA: Before this is read, I think we ought to have an opportunity to look at this and see whether or not we have any justifiable objection that the passage is not appropriately brought in in view of the response to the passages that were brought in.

THE COURT: I don't understand that it is brought inas a response to the passages necessarily.

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MR. HRUSKA: Well, there is no other basis for it, your Honor. There is no other basis--

THE COURT: They are on cross-examination,
aren't they? Are they supposed to be deprived of the
right to cross-examination because I gave you a broad right
to examine?

MR. HRUSKA: No. The passages we introduced were passages offered for impeachment, contradiction, under Rule 32.

The witness is a third party witness. We assume that members of the class are third party witnesses.

He is here on the stand.

There is no independent basis, even on crossexamination, to use his deposition.

THE COURT: They are not reading his deposition into the record. They are asking him a question on the hasis of it.

MR. HRUSKA: Mr. Gitter was just about to read a question and an answer from the deposition.

THE COURT: Aren't you then going to ask him a question on the basis of that?

MR. GITTER: I was going to ask the most elementary form of cross-examination, your Honor, that I know,
about, and although I am not too experienced, as I understand

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it, the most elementary form of question is to ask the witness if he gave the answers, heard the questions, and if they were true then and true now.

THE COURT: That is if you are trying to prove what he said now is inconsistent with what he said then.

MR. GITTER: I am trying to prove what he said then was consistent with what he said now.

I believe I am entitled to do that on crossexamination after Mr. Hruska claimed that the witness' testimony was inconsistent.

MR. HRUSKA: That is an area of counter-designation. And if we could get the passages and at least have a moment to reflect as to whether or not we have an objection to those passages being read for that purpose--

THE COURT: I am sophisticated enough to know whether or not there is consistency or inconsistency.

I am tried, frankly, of emerybody objecting to everything and I am sorry to take it out on you, but this trial is not as difficult as you all think it is from the hundreds of trials that we try daily, weekly, monthly, and yearly.

- Q Do you remember being asked the following questions and giving the following answers:
  - "Q With whom did you have conversations about your

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- "A With a representative of 3M.
- "O What was his name?
- "A Allen Arrow.
- "Q Can you recall approximately the date of your first such conversation?

"A No, I can't."

THE COURT: Mr. Gitter, I agree with your theory
but with regard to your application, what has this to co

MR. GITTER: Let me just go to the bottom.

- "Q Do you remember generally what was said?
- "A Yes. A way to make money."

THE COURT: Let's let him, every so often, admit that he answered that.

MR. GITTER: All right.

THE COURT: Did you give that answer?

THE WITNESS: I did.

- Q Was that answer true then?
- A It is true.
- Q Is it true now?
- A It is true now.
- Q On page 20, lines 12 and 13:

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| *C | What | did | you | take | into | consideration: |
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- "A way to make money."

  THE COURT: Was that your answer?

  THE WITNESS: That was my answer.
- Q Is that your answer today?
- A Now.
- Q Was that true then and is it true now, Mr. Goodman?
  - A It was true then and it is true now.
  - Q Page 25, bottom, lines 22 forward.
- \*Q Did you feel that you were being disloyal to other ASCAP publisher members?
- "A You will have to explain that question fully for me before I understand it.
- "Q Did you feel that in discussing, in negotiating an agreement with 3M you were being disloyal to the other ASCAP publisher members?
- "A You will have to explain what you mean by that.

  I don't understand that question.
  - \*Q Which part of the question don't you understand?
- "A The disloyalty part. You will have to explain that thoroughly -- why you think I would have been disloyal and how I was disloyal.
  - "Q There has been some suggestion in the record

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that others felt that negotiating with 3M would have been an act of disloyalty to ASCAP.

"You felt no such disloyalty?

- "A I don't know what you are talking about."

  THE COURT: I take it you were asked--
- Q Ware you asked those questions and did you give those answers?
  - A Yes.
- Q Were those answers true then and are they true
  - A They are.
  - Q Page 27, lines 9 through 11:
- "Q In your opinion it was a strictly dollar and coats transaction?
  - "A Correct."

Were you asked that question and did you give that answer?

- A I did.
- Q Was that answer true then and is it true now?
- A It is. It was and is.
- Q Page 24 at the bottom:
- "Q Did you communicate with any representative of ASCAP regarding the 3M approach to you?
  - "A I did not.

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- "A What part of their approach?
- "Q Any part of it.
- "A No."
- Q Did you give those answers to those questions?
- A I did.
- Q And were those answers true then and are they true
  - A That is correct.
  - Q Page 11, lims 9 through 11.
- Why are your publishing companies affiliated with ASCAP and BMI?
  - "A To make money."

    Did you give that response to that question?
  - A Yes, I did.
- Q And was that statement true them and is it true
  - A It was true then and it is true now.
- Q Mr. Godoman, according to our records, approximately 10 per cent of your 1985 ASCAP credits came from wired music sources.

Does that conform to your recollection?

MR. HRUSKA: I object, your Homor. It is leading.

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THE COURT: It is cross-examination. He is entitled to lead.

MR. HRUSKA: It is, let me just state for the record, your Honor, our position that although this may technically cross-examination, we do believe that it is artificial. We think that Mr. Goodman is a witness friendly to ASCAP and hostile to CBS.

THE COURT: Did you understand the question? THE WITNESS: I did not understand the question and I didn't hear what he said.

THE COURT: What Mr. Hruska said was unimportant at this stage for you.

Mr. Gitter, will you repeat the question so it can be heard by the witness?

Q Mr. Goodman, according to our records approximately 10 per cent of your ASCAP performance credits for 1965 came from wired music and other background music sources.

Does that conform with your recollection? I have no recollection of my statement for 1965. MR. GITTER: No further questions. MISS KEARSE: I have no questions, your Honor. MR. HRUSKA: We do not have any redirect.

THE COURT: Mr. Goodman, your testing y is com-

pleted.

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Is it your brother Benny who is a partner of yours?

THE WITNESS: My brother Harry, sir.

(Witness excused.)

MR. HRUSKA: May I be excused?

THE COURT: Yes.

MR. TOPKIS: Before Mr. Hruska leaves, could your Honor have two things, really -- your Honor had first asked Mr. Hruska to advise us whether we were ahead of or behind schedule or like the Italian airline, -- could we know where we are?

THE COURT: I would like to know but I am scared of the answer.

MR. HRUSKA: You put me on the spot.

I think the last pretrial conference prior to
the commencement of the trial, I was asked for an estimate
either by your Honor or Mr. Topkis, and I believe I stated twelve to fourteen days.

I think we are on that schedule. There have been or will be three witnesses in addition to those who we had previously expected to call.

Mr. Goodman and Mr. Vogel and Mr. Kellman coming up next.

But I believe that we can still adhere to that

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schedule and possibly go right between them 13 days.

That is subject to the usual vagaries and we have another pending matter and that is something that we have been after ASCAP on since the beginning of the trial and that is that tabulation, performance and program data which we first offered when Mr. Sipes was on the stand, and then there was discussion and it was left that ASCAP would get back to us on it.

That could affect the timing, too.

Going through the processes by which that was prepared and so forth, that could extend it and, of course, if we have to call additional witnesses on the 3M matter, that of course would extend it as well.

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MR. HRUSKA: Well, I think we have to reflect on that, in the light of developments this morning and yesterday and we have to think that through.

and see whether you think you have established what you can and what you want to. But at least from where I am, it seems to me, maybe I am wrong, but I have a pretty good picture of what 3M matter was all about, and what its results were, Ibelieve.

Well, I am moderately encouraged by what you have to say and when we, in the next day or so, we will have a robing room conference further on it.

MR. TOPKIS: Just one further question, your Honor. If Mr. Hruska proposes to use any hypothetical questions of the long variety with a witness tomorrow, I wonder whether we could have copies in advance?

MR. HRUSKA: I do not intend to do so.

THE COURM: All right.

MR. HRUSKA: That could change overnight, but I don't plan to do so now.

THE COURT: I would like to have a copy so I can be sure that I would approve of it.

MR. HRUSKA: It is not my present intention.

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|          | MR. | RIFKIND: | Our | next | witness | is | Mr. | Lecn |
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| Kellman. |     |          |     |      |         |    |     |      |

LEON KELLMAN, called as a witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

THE COURT: As you may know from experience or from sitting back there, the acoustics in this room are not good, so will you please speak up.

THE WITNESS: Yes.

## DIRECT EXAMINATION

## BY MR. RIFKIND:

- Q Mr. Kellman, are you a member of the bar?
- A Yes, I am.
- Q Are you engaged in the practice of law in New York?
- A At the present ime I am with the New YorkState
  Labor Relations Board.
- Q In 1965 and 1966, were you retained as counsel for the American Guild of Authors and Composers?
  - A Yes.
- Q During what years did you serve in that capacity?

  At that retainer?
  - A From 1962 until 1968.
  - Are you here today pursuant to subpoena, sir, by

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A Yes.

px://, an exhibit that has been received in evidence in this case, which has been shown through the testimony of Mr.

Lane and others to be a letter sent by Mr. Lane on or about November 15, 1965, to publishers who participated in the AGAC contract program.

Have you seen that letter before, Mr. Kellman?

- A There is a copy attached to the subpoena.
- Had you seen it before you received the subpoens.
- A I generally recollect such a letter at the time, in 1965.

THE COURT: You generally recollect it?

THE WITNESS: Generally recollect it, yes.

- Q Do you recall whether or not you prepared the letter?
  - A I prepared the original draft.
- Q How did you come to do that? Who asked you to do it and under what circumstances?

A At the time the 3M project came into existence, the officers and board of AGAC were concerned with the effect that this would have on their members. I prepared a study of that situation with such information as I could

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get and as I recall it was then decided to send a letter of this type on to publishers; making them aware of the views of AGAC.

Q Mr. Kellman, what was the nature of the concern of the Guild council and the board?

A They were afraid that publishers would be tempted to give groups of songs to 3M for inadequate rates and on inadequate terms for the sake of a fast buck, as it were.

Q What happened to the draft? What happened after you prepared the draft of this letter?

accepted as I prepared it or there may have been accepted as I prepared it or there may have been accepted as I prepared it or there may have been suggestions for changes which were agreed upon and made.

THE COURT: It is fair for me to bring to Mr.

Kellman's attention, if he doesn't already

recall several drafts which Mr. Blasband did furnish

this Court. I guess they are the current counsel for

AGAC.

It is their position that this material is confidential but insofar as you are asked about the history of it, I see no reason why you can't use these documents to refresh your recollection. There are four

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such documents I am handing to Mr. Kellman.

Q Do you see, Mr. Kellmau, among the papers the Court just handed you the original draft that you prepared of 3M Plaintiff's Exhibit 27?

A I see two drafts here. I don't know whether either one is the original draft. I see two drafts here of the letter.

Q Were they both prepared by you?

Was either of them prepared by you, to put it
the other way.

A I would say that they were both prepared by

me. One is dated November 1st and one is dated November

12. I assume from this that the November 1st one was

prepared before the one of November 12.

Q Are they both different from the November 15 letter that actually went out?

A I don't know. I would have to examine
them to see whether they were but I see that the November
l draft has changes in pencilwhich are not in my writing.

Q Do you recognize the writing that is on it?

A No, I don't.

THE COURT: I have examined the November lst and November 12th drafts and there are some differences between the drafts. In my opinion, they

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are not changes of very great substance but there are changes.

well, when you prepared whatever drafts you did prepare, Mr. Kellman, was it for the purpose of sending out a letter to a large number of publishers? Was that the object of the exercise?

A Well, these letters addressed dear publisher, were for the object of sending them to a large number of publishers.

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constances, I think that these documents cannot be priviloged. They were drafted with the intention of dissemination and accordingly, I would like to see them before continuing the examination.

THE COURT: I think that that is a proper position of the same conclusion that I do -that there is not very much terribly different about them
from the final products and therefore we don't need to
spend a lot of time.

it. I think it was just to assure yourself.

I will ask you to give the documents to No. Ricking.

Are you objecting to that?

MISS KEARSE: Yes, as to such portions as were not disseminated, the privilege still applies.

THE COURT: I disagree.

MR. RIPKIND: Perhaps I will pass on to other matters and if there is any distinction that seems material. to us, we will come back to that at the end, rather than delay things now.

THE COURT: All right. I may say I have a hearing in a temporary restraining order which is supposed to

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borin than at 4:30, and I hope we will be able to do

Mr. Keilman, do you recall a meeting held at the offices of AGAC in April of 1966, attended by Mr. Allen Arrow, Mr. Finkelstein, Mr. Lane, yourself, and others, perhaps?

A I recall it only from this memo that -- of April 22, 1986. I don't recall -- I don't have any independent recellection of the meeting.

O Are you looking at one of the documents that Judge Lasker just handed you?

A No. Well --

THE COURT: I gave you four.

A There must have been, yes. All of these documents were handed to me by Judge Lasker and there are two
memos here or copies of the same memo, both dated April
22, 1966. They look as though they are cpies of the same
memo.

Q Looking at that memo, do you recall, looking particularly at the first paragraph ---

THE COURT: Do you have a copy of the memo

MR. RIFKIND: I have an expurgated or bowderlized edition of it. A it is marked Plaintiff's Exhibit 127

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for identification.

Q Is it your recolldation that you in fact took notes during the meeting on April 21, 1966?

A From looking at this memo, it is my recollection.

I don't have any but the most vague recollection of a meeting.

MR. RIFKIND: It is stipulated that this meno was

THE COURT: Did you not stipulate that, Miss Rearse?

MISS KEARSE: We did not.

MR. RIFKIND: I am sorry. BMI did not. ASCAP

THE COURT: All right.

Q It has been stipulated by ASCAP that this was sent to Mr. Lane on or about April 22, 1966. Do you recall whether you had any purpose in preparing and transmitting this memorandum other than the purpose to record accurately what transpired at the meeting of April 21?

A No.

THE COURT: No, you don't recall or you did not have any other purpose?

THE WITNESS: I don't recall any other purpose other than to make a record of what was said so that Burton

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recallwhat took place, they would have a record of it.

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Kellman - direct

MR. RIFKIND: Under the circumstances, your Honor, I make two submissions. One, the original, of which Ihave the expurgated edition, is not privileged, it having been essentially a record of a public meeting that could not be privileged since non-parties were present; and secondly, that the exhibit is receivable as past recollection recorded.

THE COURT: The question raised by the present attorney for AGAC, as I recall it, was the question of privilege, so whether it is past recollection recorded would not be relevant to that. I think what I have to do is, if you want, look at the document, if that is what you are asking me to approve --

MR. RIFKIND: Yes, sir.

THI COURT: Then what I have to do is to examine the original version, and the other version, and see whether there is anything contained in the original version which appears to be of a privileged nature which, even if Mr. Kellman may not have remembered it, may have been one of the purposes. De you want me to do that now or is it satisfactory if I do it afterwards? Do you want to question Mr. Kellman about it now?

MR. RPKIND: I would like to guestion Mr. Kellman about it. This is the expurgated edition.

THE COURT: Let me see the other one. That is the

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April 22nd memo.

(Papers handed to the Court.)

THE COURT: As far as I can see, these appear to be -the two that Mr. Kellman just gave me -- appear to be the original on his letterhead and a photocopy of the original. Do you have any reason to -- Mr. Kellman, would you take a copy of this memorandum which I am looking over to see whether it is privileged or not, and I call your attention to the bottom of page 1, the last paragraph -- it won't do anybody any good except Mr. Kellman and me because the arrangement of your version is different -- and to the three first or paragraphs on page 2, which refer to your own personal views as to certain matters, and I ask you whether that in your opinion constitutes more than a recording of what took place at the meeting. I am not trying to suggest an answer. I just want to know what the facts are.

THE WITNESS: It contains certain opinions or or conclusions of my own.

THE COURT: Which were not necessarily matters dis-

THE WITNESS: That's right.

taken by AGAC's present counsel with regard to the privileged nature of the material that has been excised from the version

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given to you is properly taken, and I will sustain it as to that material which is the material I asked Mr. Kellman's view about.

MR. RIPKIND: Thank you, your Honor.

THE COURT: Under the circumstances, will you give that back to me please. I will then mail these back to ACAC's counsel, and return to you the exhibit. I will ask you to give the court clerk the name and address of AGAC's counsel so we can do that.

MR. RIFKIND: We will do it.

which has been marked PX127, and on the basis of Mr. Kellman's testimony, I submit it is receivable as past recollection recorded. He has no present recollection, he has testified, as to what transpired and it certainly appears from everything he said this was an accurate record.

THE COURT: Right, I think it is admissible under those circumstances. Any objection?

MR. TOPKIS: No objection, your Honor, except as to the way it will be used for non-hearsay purposes. There are declarations in there by non-parties.

THE COURT: Yes. I don't see how it can be offered for proof of the contents of the statements, but only that the statements were made.

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MR. TOPKIS: Right.

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THE COURT: One isn't necessarily consistent with the other.

MR. RIPKIND: With one area of exception, at least, as to the statements made by Mr. Finkelstein recorded here.

We overcome that hearsay objection as well.

THE COURT: Of course.

(PX127 received in evidence.)

0 Mr. Kellman, I ask you to look at page 4 of PX127.

THECOURT: That is the April 22nd memorandum?

MR. RIFKIND: Right, your Honor.

- Q The next to last paragraph paraphrases the statement attributed to Burton --
- A Which paragraph? What page are you referring to?
  - Q Page 4, the last page of the memorandum
  - A Yes.
- Q Do you see a statement attributed to "Buiton and I"?
  - A Yes.
- Q Can you tell us what was the basis of your feeling as you then expressed it that publishers would mathem
  work through ASCAP?

MISS KEARSE: Your Honor, I object. That has been

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admitted as past recollection recorded on the statement that the witness has no recollection. I don't see how he can be examined on his recollection if the lack of it was the basis for introduction of this document.

THE COURT: That is a real poser, I must admit.

MR. RIFKIND: No, your Honor, I think it is quite clear that he does not recall the give and take of that conversation. He may well recall why it is he felt in general that publishers would rather work through ASCAP.

A I have been away from this for a long time, and I don't really have enough of a recollection to venture a response.

of Mr. Kellman, Mr. Lane testified that something said by Mr. Finkelstein at that meeting was a source of concern to the AGAC representative present, and in some way demonstrated an arrogant manner on the part of Mr. Pinkelstein, a cause of sufficient concern that Mr. Lane then called on Mr. Stanley Adams, president of ASCAP, to speak to him about it. Do you recall anything in what Mr. Pinkelstein said or did at that meeting that was a source of concern to your colleagues at AGAC?

A No.

Q Do you recall that Mr. Pinkelstein comported himself or spoke in an arrogant manner? ii

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A No, no recollection.

Do you recall either knowing or hearing that Mr. Lane paid a visit to Mr. Stanley Adams shortly after this meeting?

A I have no recollection.

o Mr. Kellman, I would like now to go back to the draft of November 1, 1965. This looks like the only copy.

MR. TOFKIS: Can I follow it over your shoulder?

MR. RIPKIND: Perhaps we can mark it for identification

MR. TOPKIS: I just don't have a copy.

THE COURT: I think it should be marked for identification in any event.

MR. RIPKIND: I request the draft of November 1, 1965 be marked as PX866.

(PX866 marked for identification.)

THE COURT: That is a draft of a letter to the publishers?

MR. RIFKIND: That is correct, your Honor.

Just to go back a minute, Mr. Kellman, is it your recollection that you drafted what has now been marked as PX666, and that someone whose handwriting you do not recognize then marked it up?

A. Yes.

page 4, the type script portion, much of which has been SUCHERN DISTRICT COURT REPORTERS

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crossed out, and I ask you whether you wrote the portion that is in typescript.

A "Although under the consent decree of the United States court" --

MR. TOPKIS: I don't think the witness is being asked to read it aloud.

Q Just read it to yourself.

A I beg your pardon.

THE COURT: The record should indicate that everybody concerned has read it.

THE WITNESS: I have read it.

- 0 15 it your recollection that you wote that passage?
- A. Yes.
- O Do you recall why that passage was deleted in the final?
- A I don't haveany recollection as to why it was deleted.
- O. In drafting that passage, was it your intention to convey what you understand the consensus of the AGAC counsel to be?

MR. TOPRIS: Your Honor, I object.

THE COURT: I don't see that Mr. Kellman's understanding of the consensus of AGAC would be of particular competence. I assume he was writing a letter to set forth

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what he believed to be the legal rights and leverage of his clients. Is that a fair characterization?

THE WITNESS: That is what I would say.

MR. RIFKIND: It does go beyond lega! rights. He is expressing general opinions about what is fair and square in this industry.

THE COURT: Youcan ask him what the source of that material was.

what is the source, what is the basis for the views that you here express? Let me call your attention to one or two in particular --

MISS KEARSE: Your Honof, if Mr. Rifkind is proposing to read this, I will object.

THE COURT: I have read it already. I had to read it.

MISS KEARSE: I know, but I don't see any reason
it should be in the re-cord. I object to its offer into
evidence if it is going to be offered on the ground it is --

THE COURT: What is the purpose of this, Mr. Fifkind?

MR. RIFKIND: I am trying to findout what the pasis of some of the views expressed were, why this was written

people express these views at meeting, it would be relevant on, wouldn't it, if the alleged people were parties; wouldn't

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we agree on that?

MR. RIPKIND: No, It seems to me when you have an organization of which Mr. Lane was the president that represents a large number of the most distinguished writers in the United States taking a position or giving spontaneous vent to their reaction --

THE COURT: How much more do we need to prove that that was the fact? I know it was the fact.

MR. RIFKIND: But I submit, your Honor, that the explanations for their concern here as expressed in this memorandum is in material respect different from the rationalizations given by certain of the witnesses.

THE COURT: Would you mind telling me what you think is materially different?

MR. RIFKIND: Yes, where it says here that, "We are certain that publishers and writers can best preserve the value of their performing rights by permitting their particular performing rights organizations to handle these rights rather than to grant separate piecemeal licenses." that expresses a view that is shared by writers, I delieve and of critical significance to us when they tell us we can --

THE COURT: I will allow you to question what the basis

THE WITNESS: It was my own general view on the basis of having been around, thinking, but it was my own view. Apparently it was not the view of theperson who struck it out.

- You do not recall who struck it out?
- No.

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Had you participated, Mr. Kellman, in meetings of AGAC officials concerning the 3M situation at this point in time?

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Hes, I did.

When you sat down to draft this letter, were you attempting to faithfully present the concerns of your client?

A I don't recall just what took place at that time. I don't recall any meetings that you refer to . There must have been meetings on the point, on that point, which I attended with AGAC people. AS to how that letter came to be drawn, except in a general way or whether I was setting down their view, I don't recall. It was the first draft. As such it was always subject to revision by Burton Lane and others to whom it might be submitted.

> Q. Was it your view at the time that you wrote this? MR. TOPKIN: Your Honor, I submit this is enough. THE COURT: Let him finish the question, please.

Was this an accurate representation of your view as counsel for AGAC at the time you wrote it?

MR. TOPRIS: I submit that is irrelevant.

THE COURT: He has already said it expressed his view.

- is that correct?
- yes.
- Did it, to the best of your knowledge, based on whatever discussions you had with the members of the AGAC council and the other officers of AGAC express the view of the leaders of AGAC at that time?

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MR. TOPKIS: I object, your Honor, with all due respect to your suggestion.

THE COURT: Sustained. Objection sustained.

MR. RIPKIND: Your Honor, I submit that the fact that in prudence and caution and after reflection one sometimes decides not to say what one feels, doesn't reduce the probative value of one's excited utterances.

THE COURT: Who made an excited utterance? To what excited utterance are you referring?

MR. RIFKIND: What I am saying is the fact that on reflection the fact that they decided to delte this paragraph does not demonstrate that this paragraph didn't in fact accurately reflect the views of the organization for which Mr. Kellman --

THE COURT: I think we would be in bad shape if a man thought of murdering somebody, and then decided not to murder him, and then be responsible for it. I don't agree with that view, Mr. Rifkind, but that is not why I turned it down. I don't mean to say that it can never be probative. The man has expressed views of a certain kind and later trimmed them, but he has to have done something, not just to have thought about it, and the reason that I did disagree with you is because I don't think that Mr. Kellman should be called upon to testify or can be competent to testify as to

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what the views of a group of people are.

MR. RIFKIND: You will recall, your Honor, that when Mr. Lane was here, he said they did certain things and didn't do certain things on advice of counsel, but that he really wasn't up to testifying on the full scope of what their counsel had advised them.

THE COURT: I recognize the problems that this case has, but Mr. Kellman himself has said that his recollection of these affairs—he is a member of the bar who is no longer connected with AGAC: I have no reason to believe is he is not telling the truth — is very dim, and I stand by my ruling.

Mr. Kellman, this draft also expresses a view with respect to large users of performing rights, and urges that they not engage in conduct which may result in undercutting the performing rights societies. WAs that a view that you believed was shared by your client?

MR. TOPKIS: Same objection, your Honor.

want to ask him whether anyhody authorized . to speak for AGAC expressed that view as a view of the organization, I will be willing to hear it, but not just whether it reflected the view of his client, the corporation. Why don't you ask that? Why don't we ask him if somebody said it? What are

we afraid of, that the answer will be no, or what? MR. RIPKIND: No.

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Q Did anyone say this to you --

MR. TOPRIS: I object to that.

THE COURT: That was what I suggested to him.

MR. TOPKIS: I think your Honor's suggestion was more precise than that.

THE COURT: Maybe so, but let me take a crack at it.

Mr. Kellman, first of all, did that statement represent your own view only or was it a statement which either did represent your own view, also represented something that you were authoritatively told was AGAC's position?

THE WITNESS: It represented my own view. So far as whether it represented AGAC's position, I am not prepared to say that it did. That was a draft of a letter. It was intended to be signed by others, to be looked at by others, to represent their views as well as mine, and perhaps superseding mine. It was, as I say, and this was my customary way, a working draft. They could take it apart, put it together, do anything they wished.

THE COURT: In other words, the history of the process was it seems to me normal. The lawyer prepared a -

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letter which he thought might reflect the views of his client, but the client then reviewed it and made whatever corrections he wished.

THE WITNESS: That's correct, yes.

- Q Do you know whether this was reviewed by Mr. Lane and whether Mr. Lane made these excisions?
- A It was certainly reviewed by Mr. Lane among others. Who made the excisions and by whom it was reviewed at the time I don't recall.
- Q. Was it reviewed, to your knowledge or to your memory, by any other lawyer?
- A I would doubt that very much. I would doubt
  that it was reviewed by any other lawyer. I am almost
  prepared to say it was not at the time. I was the sole counsel
- Mhen you wrote these words, Mr. Kellman, you had had some years of experience with the work of AGAC and als representing others involved in the music business?
  - A. Yes.
- would be preserve the value of their performing rights by permitting the performing rights organizations to handle those rights rather than granting separate piecemeal licenses?

MR. TOPKIS: I object.

Q What was the basis for your belief that that was a sound position?

MR. TOPRIS: I object, your Honor. It the basis was what someone else told him then it was hearsay. If it's divination, then it's incompetent, and I can't imagine what else it could be.

THE COURT: I suppose it was a matter of judgment on his part.

If

MR. TOPRIS:/It was a matter of judgment or opinion then your Honor is as competent as anyone else to form that judgment or opinion.

something else. I think he wants to see whether this really was Mr. Kellman's opinion. I am not sure he is going to establish anything, but I will allow the question to be answered.

Do you recall what the basis for your expressing that view was? You said it was your view. Why was it your view?

THE WITNESS: A general view. It's difficult to go back into my mental processes after all these years and put together why I cam out with this view. It was my general view at the time.

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I can assure you that according to the minutes

of the AGAC you were at that meeting.

MISS KEARSE: Objection.

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- Q Does that help jog your recollection?
- A If the record shows I was at that meeting, then I was. I assume that I was at all or practically all meetings of the AGAC Council. That was one of my functions.
  - Q Did you take the minutes of those meetings?
- A I usually did not take minutes. Minutes were, would be taken by others. Miss Miriam Stern, who was the Executive Director of AGAC, or others.
- Q You do not recall the suggestions of any scrt from the West Coast Committee concerning 3M?
  - A No, I don't; not at this stage.
- Q Do you recall suggestions made by New York members, East Coast members, concerning the 3M?
- A . I simply would be guessing. I don't have any real recollection.
- Q In the middle of that page, Mr. Kellman, there is a phrase, "even though we are much concerned with some of the pssible consequences of the project".
  - A Yes.
- Q Other than what you have previously said, do you have any further recollection of the nature of that concern;
  - A No.
    - MR. RIFKIND: For the record, your Honor, I

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offer PX 866 for identification in evidence. That is the November 1, 1965, draft of the November 15th letter.

MR. TOPKIS: I object to it.

THE COURT: I'll sustain the objection.

MR. RIFKIND: I have no further questions.

MR. TOPKIS: I offer music o your Honor's ears.

No cross examination.

MISS KEARSE: None here, either.

THE COURT: Mr. Wollman, thank you very much.

You are excused.

(Witness excused.)

THE COURT: We will adjourn until tomorrow morning at ten o'clock.

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(Questions to Mr. Goodman from deposition pages 28-30:

"Do you believe that it's wrong for ASCAP members to compete with ASCAP for the licensing of performance rights?

"A Yes.

"Q Why?

\*A Because I think as individuals we have no strength.

"Q Then you believe it's important as a publisher

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to combine with other publishers and have a common licensing agent?

"A No doubt in my mind.

"Q Do you believe that when individual publishers enter into direct licenses with users which bypasses ASCAP that that weakens the strength of ASCAP?

"A No doubt.

"Q Then if 3M hal come to you in the first instance without ever having gone to ASCAP you would have suggested that they go to ASCAP?

"MR. BLUMSTEIN: I will object to the form of that question, too.

"THE WITNESS: Repeat the question, please.

"(Question read.)

"A If I knew then what I know now, the answer is yes.

"Q What do you know now that you didn't know then?

"A I know more about the publishing business that.

I knew then.

Do you believe that once ASCAP has undertaken to offer licenses to a category of users that the members should refrain from dealing with those users?

"MR. BLUMSTEIN: Objection as to form.

"A 1 do."

(Court adjourned.)

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